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S. HRG. 108–135, PT. 6

CONFIRMATION HEARINGS ON FEDERAL APPOINTMENTS

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

JANUARY 22, JANUARY 28, FEBRUARY 5, FEBRUARY 11, FEBRUARY 25, AND MARCH 10, 2004

Serial No. J–108–1

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THURSDAY, JANUARY 22, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:00 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Jon Kyl, presiding.

Present: Senators Kyl, Specter, Craig, and Durbin.

OPENING STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Let me call this meeting of the Senate Judiciary Committee to order just one or two minutes early, and if there are members of the dais here who come at 10 o'clock, then I will afford each of them an opportunity to speak. But let me just tell you generally that I am very pleased to have all of you here. We are going to consider the nominations of three candidates nominated by the President for Federal district court and one for the Circuit Court of Appeals.

We will begin with introductory statements from Senators or Representatives who wish to introduce candidates from their State. Following all of those introductions, we will then call the panelists en banc, if there is no objection, to the table for their opening statements and then questioning from members.

We will also, I want to make clear, afford everyone an opportunity to introduce friends and family who may be here today. This is an important event, and I think that every one of the nominees here should be very, very proud to be here, and the family and friends who are here I am sure are equally proud to be here today

in support of their family or friend who has the important distinction of being nominated by the President of the United States to serve on the Federal judiciary. And that is why I think it is especially appropriate and it is the custom of the Committee to recognize those who are here in the audience to share in the hearing today.

I want to make one preliminary comment, too. The hearing for nominees almost always is not the kind of formal affairs that you sometimes see on television or you perhaps have seen in a case of a very controversial nominee. And that is because most of the nominees are not very controversial. The reason for that is that there is an extensive vetting process, and those of you who have been nominated know exactly of what I speak. You have got to fill out so many forms. You have got to have so many interviews. You have got to be considered by the White House Office of Legal Counsel, the Attorney General, the American Bar Association.

This Committee and its staff have already engaged in an extensive investigation, and basically when the Committee staff and Committee members conclude that the nominee is well qualified and does not need to undergo a great deal of public scrutiny in this hearing, then the hearing can go very well.

But I do not want you in the audience to assume that because this hearing is likely to fall into that category that members do not care, or that the fact that there are not other Senators here is a sign that they do not care. What you should be appreciative of is the fact that there has been a great deal of preliminary work that has gone into the vetting of these nominees, all of whom have been found very qualified. And that is the reason why you are not likely to see a lot of fireworks here today and it may seem to be a little bit more pro forma. But you should not take from that a lack of interest but, rather, be very proud of the people who have been nominated because they have been found to be very qualified and without significant controversy. At least I hope that is the way the hearing here will go today.

Now, let me begin by calling on those Senators or Representatives who are here to make introductions, and our colleague, a member of the Senate leadership, Senator Rick Santorum of Pennsylvania, is the first to arrive. Therefore, Senator Santorum, the floor is yours.

PRESENTATION OF GENE E.K. PRATTER, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Senator Kyl, and I want to echo your remarks about the fine work that this Committee does in reviewing candidates and making recommendations, and I am confident that the person I am going to introduce will be one such noncontroversial nominee.

Gene Pratter is a lawyer's lawyer. She is someone who has come with the highest recommendations from all of the bar associations in southeastern Pennsylvania and from lawyers from the left to the right. She is someone who has really invested her career in the law and has contributed greatly to it and to the bar in Philadelphia.

She has also done, as you would expect of someone who is very proficient, she has lent her abilities to numerous non-profit organizations and has contributed greatly to the community, greatly to her law school, which is the University of Pennsylvania, one of the finest law schools in the country, which we are very proud of.

This is the first chance, I just want you to know, to be able to introduce a nominee from Pennsylvania first, and I want to thank you for starting early because this is truly an honor for me, because Senator Specter, as my senior Senator, always goes first, as he should. But it is a pleasure for me to be the first to comment on Gene Pratter, and she is an exceptional individual. She will be an exceptional judge and someone who I have gotten to know over the years from the outstanding work that she has done, not just legally but for the community. And I am honored to be here today to recommend her to the Committee.

With that, I will defer to my colleague to give all the particulars, which he is very good at doing, and to make whatever comments that he would like to make.

Senator KYL. Thank you, Senator Santorum, and let me call on Senator Specter, a member of this Committee, in just one moment. I was remiss in not doing one thing, and then I would also like to do another.

The scorecard, since we do not pass it out, I will give to you now, and that is that, again, without objection, we will consider all of the nominees on one panel. First on the panel will be Raymond W. Gruender, to be United States Circuit Judge for the Eighth Circuit. And then the other three nominees for Federal district courts are: Ricardo S. Martinez, to be United States District Judge for the Western District of Washington; Gene E.K. Pratter, to be United States District Judge for the Eastern District of Pennsylvania—just introduced by Senator Santorum; and Neil Vincent Wake, to be United States District Judge for the District of Arizona. And I will have some comments about Neil Wake in just a moment.

Secondly, I would like to, without objection, submit a statement by the Ranking Member of the Committee, Senator Leahy, for the record. Without objection, it is submitted.

Senator Specter, the floor is yours.

PRESENTATION OF GENE E.K. PRATTER, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. I am delighted to be here with my distinguished colleague, Senator Santorum, to formally introduce Ms. Gene Pratter to this Committee. I regret being a trifle late. I compliment you, Mr. Chairman, on opening on time—practically a violation of the rule of the Committee on the Judiciary to open on time. But I am chairing a hearing of the Subcommittee on Labor, Health, Human Services, and Education, so I will be brief.

Gene Pratter brings very extraordinary credentials to this position. She is a graduate of Stanford University with honors, 1971; a J.D., University of Pennsylvania, 1975. She practices as a general partner with the distinguished law firm of Duane, Morris and

Heckscher in Philadelphia, where she has taken on the role of being a lawyer's lawyer in handling matters of unique complexity.

She is a member of all the appropriate bar associations. She has very extensive contributions to the community and brings really extraordinary qualifications to the United States District Court for the Eastern District of Pennsylvania.

Senator Santorum and I have continued the tradition which Senator Heinz had begun many years ago of a bipartisan nominating panel so that the people who come forward have credentials over and above what may customarily be involved in the selection of a Federal judge.

I see Senator Murray waiting, so I will be brief so that I can return to my other commitments. But I think it is a bright day for the Federal bench to have someone of Ms. Pratter's qualifications ascend to this position.

Thank you, Mr. Chairman.

Senator KYL. Thank you very much, Senator Specter. And it should be obvious that we are on multiple assignments this morning, and I appreciate, Senator Specter, your ability to be here to make that introduction.

Since Senator Murray is here, Senator Murray, let me call upon you next for the purpose of an introduction.

PRESENTATION OF RICARDO S. MARTINEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON, BY HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator MURRAY. Well, thank you very much, Mr. Chairman. I really appreciate your willingness to do that and your accommodation this morning, and also to the other members of the Committee.

Mr. Chairman, 48 years ago, a young boy was picking strawberries on a Washington State farm for 75 cents an hour. Today, that man stands before the United States Senate after more than 20 years of distinguished legal service, ready to be confirmed as the next U.S. District Court Judge for the Western District of Washington State. His name is Ricardo Martinez, and I am here today to offer my full support for his speedy confirmation. He will be the first Latino to serve as a district court judge in Washington State's history.

Senator Cantwell and I worked with President Bush to select Judge Martinez from a list of very qualified candidates, and today I am proud to be here to introduce him before the Senate Judiciary Committee. I want to especially welcome his family to the Senate today: his wife, Margaret, and their three daughters, Lela, Jessica, and Gabriela. I know they are very proud of their dad today. And I know that back in Washington State there are many people who have worked with him over the years who share their pride.

Mr. Chairman, I have met with Judge Martinez, and I have been very impressed by his professionalism, his decency, and his experience. It is no wonder that he has the strong support of a wide group of attorneys and community leaders throughout Washington State.

There are many things I could say today about Judge Martinez. I could tell you about his education, that he was first in his family

to go to high school, and that he earned undergraduate and law degrees from the University of Washington. I could tell you about his distinguished legal career, his 10 years as a prosecutor for King County or more than 8 years as King County superior court judge. And I could tell you about his current work as magistrate judge for the Western District of Washington, a position he has held for 5 years.

Or I could tell you about his innovative and thoughtful work helping people break their addiction to drugs and crime. Judge Martinez, in fact, helped create the first drug diversion court in the State of Washington and served as one of its first judges. This innovative court gives drug-addicted defendants an alternative to incarceration and has helped graduates kick their habits and lead productive lives. For years, Judge Martinez worked tirelessly to ensure the success of this treatment option.

Or I could tell you about his generous sense of community service, from his work on the Washington State Sentencing Guidelines Commission, the Minority and Justice Commission, to coaching soccer and basketball for the Redmond-Kirkland Boys and Girls Club.

I could tell you all of those things, but instead I would like to share with you and this Committee something that Judge Martinez himself said to the Seattle Times in August. He told the newspaper, "I've always considered myself extremely lucky. I was driving through Snohomish County the other day, and I saw some migrant farm workers along the road. And I said to myself, 'You know, I'm not far removed from them.'"

Judge Martinez has been lucky, but he has also made his own luck by working hard and giving back to our State. He has earned everything that has come his way, and I believe he has earned a seat as our next district court judge. His fairness, thoughtfulness, and compassion set a great example for so many people in our State, and I am proud to support his confirmation before the Senate Judiciary Committee.

Mr. Chairman, Senator Cantwell could not be with us this morning. She asked that I submit her statement for the record as well.

Thank you very much.

Senator KYL. Thank you, Senator Murray. It will be submitted, and thank you for that excellent opening statement.

Senator Larry Craig has joined us. If you do not have an opening statement, I will—

Senator CRAIG. I do not.

PRESENTATION OF NEIL VINCENT WAKE, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA, BY HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Okay. Senator Bond from Missouri is allegedly on his way, and I think he has an introduction. So in the meantime, to keep the hearing moving, let me give you an introduction, which is of one of the nominees from the State of Arizona, which I represent. And Senator McCain joins me in expressing appreciation to President Bush for nominating Neil Wake for the Federal District Court in Arizona.

Neil is an Arizona native. He practiced law for 29 years in Phoenix as a partner in several law firms and recently a sole proprietor

of his firm. He received a bachelor's degree with honors from Arizona State University and a law degree cum laude from Harvard University, where he was a member of the Harvard Civil Rights and Civil Liberties Law Review.

His practice has focused primarily on civil matters and appellate work. He practiced exclusively in Federal and State courts, including the United States Supreme Court, and has been involved in a variety of continuing legal education programs and publications, including articles in the fields of administrative law and appellate procedure.

He has received a great deal of recognition from his peers. Since 1989, he has been listed in the Best Lawyers of America for Business and Appellate Litigation. That is from recommendation of other lawyers, and about 1 percent of the lawyers are recognized in that fashion. Since 1993, he has been a fellow of the American Academy of Appellate Lawyers, a society of fewer than 300 members nationwide who are admitted by invitation only and after careful investigation.

Senator Bond, please take the dais, and I will call on your in just a moment. I was just completing the introduction of a candidate from Arizona.

Neil Vincent Wake was honored by the American Bar Association's Standing Committee on the Federal Judiciary by unanimously giving him the highest evaluation of well qualified for the appointment as judge of the United States District Court. He has a variety of civic activities and bar associations achievements, including being a founding member and current Chairman of the State Bar's Indian Law Section and Appellate Practice Section, served five times as judge pro tem of the Arizona Court of Appeals. He and his wife, Shari, and other parents founded the ICU Care Parents, a support group for parents of critically ill newborns. And knowing Neil and Shari very well, I can attest to a variety of other important community contributions that they have made.

They are the parents of three sons, and I know that Neil Wake will be proud to introduce his family in a moment as well.

As I said, Senator McCain joins me in expressing appreciation to the President for his nomination of Neil Vincent Wake.

Now we are joined by Senator Chris Bond of the State of Missouri. Senator Bond, the floor is yours.

PRESENTATION OF RAYMOND W. GRUENDER, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, BY HON. CHRISTOPHER BOND, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator BOND. Thank you very much, Mr. Chairman, Senator Craig, members of the Committee. It is a real pleasure for me to be here today to introduce to you and present to you a good friend, fellow Missourian, Ray Gruender, who has been nominated to serve on the Eighth United States Circuit Court of Appeals.

I have known Ray both personally and professionally for many years. He is an excellent lawyer. I am just delighted that the President nominated him for this position. I am confident that the Committee, after you review his credentials and listen to his responses,

will conclude that Ray is not only well qualified for the bench but he will be a tremendous addition to the Federal judiciary.

I do not need to tell you the United States Courts of Appeals are extremely important, and the decisions that come before these courts have impacts on every aspect of society. And I think that we should have only the finest, most qualified jurists serving on these bodies. And certainly Ray fits that qualification.

Ray enjoys the respect of the Missouri legal community. Many have told me, in recommending his nomination, that Ray's demeanor, his willingness to listen, and his very clear intellect are great qualifications.

He has an abundance of many other qualities that elevate him as one who is not only qualified through experience, but his work ethic and humility. I believe, as I think most Missouri lawyers do, that Ray will be a judge who is thoughtful, careful, approachable, and one who will respect the role of a judge and the restraint imposed upon the judiciary by the Constitution.

Ray currently serves as the United States Attorney for the Eastern District. He has been there since May of 2001. He supervises 60 attorneys in a jurisdiction that is both urban, suburban, and rural, with all the challenges that come with such a demographic makeup.

As U.S. Attorney, he has embarked on a campaign of aggressive prosecution of Federal gun violations. The largest city in his jurisdiction, St. Louis, has an unfortunate legacy of violent crime. But I believe in no small part due to the aggressive efforts of the U.S. Attorney's Office under Ray Gruender's jurisdiction, there has been a tremendous reduction in the number of murders, the number of homicides in St. Louis. Ray is taking the gun-toting felons off of the street, and it is a very clear remedy, and he has applied it very well.

But Ray has also practiced law for 17 years. He has great experience as a private attorney. He worked as a partner in a well-respected Missouri firm, spent many hours in Federal court and State court representing clients on criminal and civil matters, including admiralty, antitrust, contracts, employment, securities fraud, banking, and a number of tort claims.

But just to give you a snapshot of his personal qualities, as a graduate of Washington University in St. Louis, Ray earned his degree and an MBA and a law degree in only 6 years, finishing strongly in all, while working and putting his way through school. He rose from humble beginnings to become U.S. Attorney, and I think that he would make a great addition to the United States Court of Appeals for the Eighth Circuit.

I thank you, Mr. Chairman, members of the Committee, for scheduling this hearing. I hope that you will be able to move this nomination quickly and that we can get him confirmed yet this year.

Senator KYL. Thank you very much, Senator Bond. I think it is important that we have had people introduce these candidates who know them personally, and that is a very important contribution to the hearing record. So thank you very, very much, Senator Bond.

Now, unless there are any other introductory statements—and I know all of the Senators who have made introductory statements

will have to go to other duties here, so we will allow Senator Bond to exit, and then I will call each of the nominees forward. And, again, without objection, we will consider all of the nominees as one panel.

Hearing none, then let me ask the following people to come to the dais, and would the staff please get the proper name tags here for us? Raymond Gruender, Ricardo Martinez, Gene E.K. Pratter, and Neil Vincent Wake.

Actually, before you sit, would you all stand and let me swear you in, if I could. Do you all swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Mr. GRUENDER. Yes.

Judge MARTINEZ. Yes.

Ms. PRATTER. Yes.

Mr. WAKE. Yes.

Senator KYL. Thank you. Now, that includes with regard to your family members here.

[Laughter.]

Senator KYL. I am going to ask each of you to take an opportunity to make an opening statement, if you would like, and certainly to introduce friends and family who are here. And, Raymond Gruender, let me begin with you and welcome you to this hearing. I would ask you to make any statement you would like to make, and make those introductions at this time, if you would like.

STATEMENT OF RAYMOND W. GRUENDER, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT

Mr. GRUENDER. Thank you, Mr. Chairman.

Very briefly, I'd like to thank the Committee for arranging this hearing today. I'd also like to thank President Bush, both for allowing me to serve and nominating me to serve as the United States Attorney for the Eastern District of Missouri, as well as this nomination pending today.

I'd also like to thank Senator Bond for his kind remarks on my behalf, and, finally, I'd like to introduce my family members that have come.

Senator KYL. Please.

Mr. GRUENDER. My wonderful wife, Judy, is behind me to my left.

Senator KYL. Please stand as he introduces you. That is good, and remain standing so we can give you a round of applause here at the end.

Mr. GRUENDER. And her mother, Jeannette Calhoun; and to my right is my mother, Sharon Gruender; and my good friend, Sharon Lentin, who recently got married. Thank you.

Senator KYL. Well, thank you all very much, and I would like to give these people who are obviously good supporters of Mr. Gruender a round of applause for your being here today. Thank you.

[Applause.]

Senator KYL. The role of those in support of the nominees is appreciated by us all, I can assure you.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

   Raymond William Gruender

2. **Address: List current place of residence and office address(es).**

   Residence: St. Louis, Missouri

   Office: 111 S. 10th Street, Room 20.333, St. Louis, Missouri 63102

3. **Date and place of birth.**

   July 5, 1963 - St. Louis, Missouri

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   Married - Judith C. Gruender (nee: Calhoun)
   Consultant, Aon Consulting, Inc.
   8182 Maryland, St. Louis, Missouri 63105

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Washington University, St. Louis, Missouri
   Juris Doctorate, May 1987
   (August 1984 to May 1987)

   Washington University, St. Louis, Missouri
   Master of Business Administration, May 1987
   (August 1984 to May 1987)

   Washington University, St. Louis, Missouri
   Bachelor of Science Business Administration, May 1984
   (August 1981 to May 1984)

6. Employment Record: **List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

5/2001 - Present:	United States Department of Justice United States Attorney's Office Eastern District of Missouri
Position:	United States Attorney
2001 - Present:	High Intensity Drug Trafficking Area (HIDTA)
Position:	Executive Board (serve in capacity as United States Attorney)
2001 - Present:	Gateway Information Sharing Project
Position:	Executive Board (serve in capacity as United States Attorney)
1/2000 - 5/2001	United States Department of Justice United States Attorney's Office Eastern District of Missouri
Position:	Assistant United States Attorney
1999 - 2000	Talent for Governor, Inc.
Position:	Officer and Director (volunteer)
1999 - 2002	Shakespeare Festival of St. Louis
Position:	Board of Directors (volunteer)
1998	Leadership Alliance
Position:	Officer and Director (volunteer)
1997 - Present	Variety Club of St. Louis
Position:	Allocations Committee (volunteer)
1/1994 - 1/2000	Thompson Coburn, LLP
Position:	Partner (Trial Attorney)
8/1996 - 11/1996	Dole Kemp '96
Position:	Executive Director - Missouri
1995 - 1996	Downtown/Marquette YMCA
Position:	Board of Managers (volunteer)

10/1990 - 1/1994	United States Department of Justice United States Attorney's Office Eastern District of Missouri
Position:	Assistant United States Attorney
1990 - 1994	ALIVE (Alternatives to Living in Violent Environments), a not-for-profit organization
Positions:	President of the Board of Directors, Vice President and Secretary (volunteer)
8/1987 - 10/1990	Lewis, Rice & Fingersh
Position:	Associate (Trial Attorney)
5/1981 - 8/1987	Otto Faerber & Associates
Position:	Personnel Technician

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

None

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

One of *St. Louis Business Journal's* "40 Under 40"
Order of the Coif (Law School Honorary Society)
Beta Gamma Sigma (Business School Honorary Society)
Fisse Scholarship
W.L. Hadley Griffin Scholar
Chancellor's Scholarship
Krebs Accounting Scholarship
National Merit Scholar
Staff Member of Washington University Law Quarterly
One of Ten Outstanding Young St. Louisians-St. Louis Jaycees
United States Attorney's Special Achievement Award

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

American Bar Association, 1987 - 1990
Federalist Society, 1988 - present
Bar Association of Metropolitan St. Louis, 1987 - present

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

Other organizations to which I belong:
- St. Joseph's Catholic Church (member)
- Variety Club of St. Louis (allocations committee volunteer) (by-laws attached)
- Glen Echo Country Club (member) (by-laws attached)

To the best of my knowledge, none of these organizations is active in lobbying before public bodies.

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Missouri Bar, since 1987
Illinois Bar, since 1988
United States District Courts
- Eastern District of Missouri, since 1987
- Western District of Missouri, 1987 - 1990 (voluntarily lapsed due to non-appearance)
- Southern District of Illinois, since 1989

United States Court of Appeals, Eighth Circuit, since 1989

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

I have not written or edited any books or magazine articles.

In October 2001, along with the Civil Rights Division of the Department of Justice, I issued a report explaining why a criminal civil rights prosecution would not be brought by the United States Attorney's Office against a DEA agent and a police officer. These individuals had shot and killed two men whom (they claimed) they feared were going to assault

them with their vehicle during a drug arrest. (A copy of this report is attached.)

As United States Attorney, I have also authored several opinion-editorial articles and letters to the editor of the *St. Louis Post-Dispatch* (copies attached) as follows.

Date	Subject
October 2001	Letter to the editor regarding the civil rights investigation mentioned above.
January 2002	Letter to the editor regarding refusal to notify press in advance of guilty pleas of two defendants in a public corruption case.
February 2003	Op-ed article and letter to editor in response to local municipality that passed a resolution instructing its law enforcement officers not to cooperate with federal authorities based, at least in part, on misinformation about the Patriot Act.
June 2003	Letter to the editor regarding federal firearms prosecutions.

I have also given several speeches and legal education programs and numerous remarks and introductions. The chart below (including the date, audience and subject) reflects my best efforts to recall and document these events.

Date	Audience	Subject
1/91	Attorney members of the Bar Association of Metropolitan St. Louis	Sentencing guidelines training for attorneys appointed to defend federal criminal matters (brochure attached)
1/93	Insurance attorneys, investigations and carriers	Insurance fraud (no attachment)
8/93	St. Louis Forum	Family violence-issues and alternatives (no attachment)

Date	Audience	Subject
10/93	West County Chamber of Commerce	U.S. Attorney's Office/ white collar crime (attached)
5-11/94	Prospective voters	My candidacy for St. Louis County Prosecuting Attorney (outline of typical speech attached)
3/95	Christian Legal Society	Nuts and bolts of criminal defense practice (attached)
5/01	Organized Crime Drug Enforcement Task Force conference attendees	Opening remarks (attached)
7/01	Recently naturalized citizens	INS naturalization ceremony guest speaker (attached)
8/01	Law enforcement executives	Opening remarks at conference (attached)
8/01	Law enforcement officers	Opening remarks for motor vehicle drug interdiction conference (attached)
9/01	Law enforcement executives	Media rules and policy (attached)
9/01	Graduates of St. Louis County Police Academy	Graduation speech (attached)
12/01	Friends, family, judges and lawyers	Speech after investiture as U.S. Attorney (attached)
1/02	Government attorneys at asset forfeiture seminar	Opening remarks (attached)
2/02	Graduates of St. Louis Metropolitan Police Dept. Academy	Graduation speech (attached)

Date	Audience	Subject
2/02	Criminal defense attorneys	U.S. Attorney's Office structure and priorities (attached)
3/02	Missouri state prosecutors	Relationship between state and federal prosecutors (attached)
4-6/02	1) Enterprise Leasing employees 2) Generations Club members 3) Hispanic Leaders' Group of St. Louis	Events of September 11, terrorism and Department of Justice response (attached)
4/02	Law enforcement and public attendees at police prayer breakfast	Officers lost on September 11, 2001 (attached)
4/02	Attendees at Weed & Seed Workshop	Opening remarks (attached)
5/02	Attendees at Regional Weed & Seed Conference	Opening remarks (attached)
5/02	Law enforcement attendees at anti-terrorism training	Opening remarks/terrorism (attached)
6/02	Graduates of Drug Education for Youth (DEFY) camp	Graduation speech (attached)
7/02	Attendees at victims roundtable discussion	Opening remarks/crime victims (attached)
9/02	Attendees at Lead Free 2003 conference	Opening remarks/lead poisoning (attached)
9/02	Corporate security personnel	Opening remarks/terrorism (attached)
2/03	Attendees at local Weed & Seed meeting	Weed & Seed program (attached)
4/03	Office of Immigration Litigation conference attendees	Opening remarks/ immigration litigation (attached)
6/03	St. Louis Rams rookies	Welcome remarks/criminal law (attached)

Date	Audience	Subject
6/03	Drug Education for Youth (DEFY) graduates	Graduation remarks (attached)
9/03	Law enforcement attendees at methamphetamine training conference	Opening remarks (attached)

13. **Health: What is the present state of your health? List the date of your last physical examination.**

My health is excellent. My last physical examination was on August 29, 2003.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

I have not held a judicial office.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

Not applicable.

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

From May 1, 2001 until now, I have served as the United States Attorney for the Eastern District of Missouri. I was nominated by President Bush and confirmed by the United States Senate. Between 1990 and 1994 and again between 2000 and 2001, I served as an Assistant United States Attorney.

In 1994, I was an unsuccessful candidate for St. Louis County Prosecuting Attorney.

In 1995, I was appointed by the St. Louis County Council to an Advisory Committee to the St. Louis County Council on county government and the county charter. This project lasted approximately six months.

17. **Legal Career:**

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No

2. whether you practiced alone, and if so, the addresses and dates;

No

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

January 2000 to present and
October 1990 to January 1994
United States Attorney's Office
Eastern District of Missouri
111 S. 10th Street, Room 20.333
St. Louis, Missouri 63102
(Assistant United States Attorney and
United States Attorney)

January 1994 to January 2000
Thompson Coburn, LLP
One Firstar Center
St. Louis, Missouri 63101
(Partner)

August 1987 to October 1990
Lewis, Rice & Fingersh
500 N. Broadway
St. Louis, Missouri 63102
(Associate)

b. 1. **What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

After graduating from law school in 1987 (and for two summers during law school), I was an associate at the large St. Louis law firm of Lewis, Rice & Fingersh. While there, I handled all aspects of commercial litigation with an emphasis on white collar criminal defense, admiralty and banking/lender liability. I also was the Assistant Prosecutor for the City of Town & Country, Missouri.

In October 1990, I joined the United States Attorney's Office for the Eastern District of Missouri where I served as an Assistant United States Attorney. While there, I was a criminal trial attorney specializing in white collar and economic crimes, including major fraud and corruption cases.

In January 1994, I joined the St. Louis law firm of Thompson Coburn, LLP and was made a partner in 1996. I specialized in complex commercial and securities litigation and represented witnesses, victims and defendants in fraud or white collar crime, as well as civil and criminal environmental enforcement matters.

In January 2000, I returned to the United States Attorney's Office for the Eastern District of Missouri as an Assistant United States Attorney specializing in fraud and corruption prosecutions. On May 1, 2001, I was appointed for 120 days by the Attorney General as the United States Attorney for this District while my nomination was pending. After 120 days, I was appointed

United States Attorney by the District Court. Subsequently, I was nominated, confirmed and Presidentially appointed as the United States Attorney. As United States Attorney, I oversee the work of approximately 60 attorneys in both criminal and civil matters representing the government.

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

People and agencies of the United States while in the United States Attorney's Office. In addition, typical former clients included large and small businesses, brokerages and individuals.

c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

The frequency of my court appearances varied. While serving as an Assistant United States Attorney, I appeared in court on a weekly basis (on average). As United States Attorney, my court appearances have been less frequent. While in private practice, court appearances also were less frequent (perhaps on a monthly basis).

2. **What percentage of these appearances was in:**
(a) federal courts;

Approximately 75 percent

(b) state courts of record;

Approximately 15 percent

(c) other courts.

Approximately 10 percent (securities and other arbitration matters)

3. **What percentage of your litigation was:**
(a) civil;

Approximately 35 percent

(b) criminal.

Approximately 65 percent

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

I have tried to conclusion eight cases. In one case, I served as second chair; in two other cases, I served as co-counsel. In all other trials, I was the lead or sole trial attorney.

In addition, I had numerous municipal ordinance violation trials while serving as the Assistant Prosecutor for the City of Town & Country, Missouri.

5. **What percentage of these trials was:**
(a) jury;

Approximately 60 percent

(b) non-jury.

Approximately 40 percent

18. **<u>Litigation</u>: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) **the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

NOTE: Unless identified otherwise, all cases were litigated in the United States District Court, Eastern District of Missouri:

1. Second Injury Fund Scandal - During 1992 through early 1994, as an Assistant United States Attorney representing the government, I investigated and prosecuted several lawyers, physicians and an administrative law judge who were defrauding the Missouri Second Injury Fund and Missouri workers' compensation insurance carriers. The government also was represented in these matters by Assistant United States Attorney James G. Martin, 111 S. 10th Street, St. Louis, Missouri, (314) 539-2200. The matters included the following:

(a) United States v. William E. Roussin, Docket No. 4:92CR296 GFG (Honorable George F. Gunn). The defendant was represented by Leonard Frankel, Attorney at Law, 231 S. Bemiston, St. Louis, Missouri 63105, (314) 725-8000. The case resulted in a guilty plea and prison sentence for Mr. Roussin.

(b) United States v. Morris Kessler, V. John Kessler, Dr. Alex Shreim and Nadim Nasrallah, Docket No. S1-4:92CR310 SNL (Honorable Stephen N. Limbaugh). This case also resulted in the entry of guilty pleas by all defendants. The Kessler defendants were represented by Ronald Jenkins, Attorney at Law, 10 S. Brentwood Blvd., St. Louis, Missouri 63105, (314)721-2525; defendant Shreim was represented by Arthur Margulis, 11 S. Meramec, St. Louis, Missouri 63105, (314) 721-6677; and defendant Nadim Nasrallah was represented by Barry A. Short, Attorney at Law, 500 N. Broadway, St. Louis, Missouri 63102, (314) 444-7601.

(c) United States v. Erio Comici, Docket No. 4:93CR36 CEJ (Honorable Carol E. Jackson). This case also resulted in a guilty plea by an administrative law/workers' compensation judge. The defendant was represented by Burton Shostak, Attorney at Law, 8015 Forsyth Blvd., St. Louis, Missouri 63105, (314) 725-3200.

(d) United States v. William Londoff, Docket No. 4:93CR211 ELF (Honorable Edward L. Filippine). This case also resulted in a guilty plea. The defendant was represented by David Capes, Attorney at Law, 7701 Forsyth Blvd., St. Louis, Missouri 63105, (314) 721-7701, and Richard Greenberg, Attorney at Law, 10 S. Broadway, St. Louis, Missouri 63102, (314) 241-9090.

2. United States v. Wells, Hinkson & Reichwein, Docket No. 91-103CR(5) (Honorable Stephen N. Limbaugh). This was a complex, document intensive, FEMA flood insurance fraud prosecution wherein all defendants were convicted on all counts after a two-week trial in 1992. I served as lead counsel for the United States as an Assistant United States Attorney. The case was taken on appeal, and an unpublished opinion was issued on September 16, 1992 by the 8th Circuit affirming the convictions in docket number No. 91-3539 EMSL. The defendants were represented by Dan O'Brien, Attorney at Law, 1250 Big Bend, St. Louis, Missouri 63117, (314) 645-1105; James Sullivan, Attorney at Law, 1370 McCausland, St. Louis, Missouri 63117, (314) 781-9700; and Roldolfo Rivera, Attorney at Law, 16 N. Central, St. Louis, Missouri 63105, (314) 721-2130.

3. United States v. James Mills, Docket No. 4:91CR96 GFG (Honorable George F. Gunn). I was the sole Assistant United States Attorney in this two-week trial in 1993. The case centered on an advance-fee loan scheme involving over $500 million of loan proposals. The defendant was convicted on all counts and received an eighty-month sentence. The matter was upheld on appeal in United States v. Mills, 987 F.2d 1311 (8th Cir. 1993). The defendant was represented by James Delworth, 111 S. 10th Street, St. Louis, Missouri 63102, (314) 539-2200.

4. In the matter of the Arbitration Between Robert W. Sides and Gruntal & Co., NYSE Docket No. 1997-006827. During 1999 while in private practice, I represented, as lead counsel, claimant Robert W. Sides in this New York Stock Exchange securities arbitration of a claim of a former broker against his former firm for breach of employment contract. A publicly available award was issued by the arbitration panel in favor of my client for an amount in excess of $4 million. All other matters are subject to a confidentiality agreement. The respondent was represented by Donald N. Cohen, in-house counsel for Gruntal & Co., LLC, 1 Liberty Plaza, 14th Floor, New York, New York 10006-1487.

5. John Borsa v. Special School District of St. Louis County, (Honorable James Hartenbach, Division 14 of the Circuit Court of St. Louis County). As sole counsel, I represented Dr. John Borsa, former superintendent of schools, in his claim against the Special School District of St. Louis County for breach of his employment contract. I successfully obtained a summary judgment for approximately $350,000, which was affirmed on appeal by the Missouri Court of Appeals. That case is reported as Special School District of St. Louis County v. Borsa, 926 S.W.2d 547 (Mo. App. E.D., July 30, 1996). The defendant was represented by Laurence Mass, Attorney at Law, 230 S. Bemiston, St. Louis, Missouri 63105, (314) 862-3333.

6. In the matter of the Arbitration Between Baldwin and D.H. Blair & Craig Weber, NASD Arbitration Docket No. 96-04527. I was lead counsel in this 1998 NASD securities arbitration wherein I represented the respondent brokerage house and broker against a claim of improper trading and failure to follow trading instructions by a customer. After a securities arbitration trial, the arbitrators issued a defendants' verdict on all claims. The claimant was represented by Mark T. Keaney, Attorney at Law, 500 N. Broadway, St. Louis, Missouri 63102, (314) 444-7600.

7. United States v. Dennis Hoffman, Docket No. 4:92CR259 JCH (Honorable Jean C. Hamilton). This was an investigation and prosecution that I handled during 1992 and 1993 as an Assistant United States Attorney. The investigation and prosecution involved numerous individuals who staged automobile accidents and then made false insurance claims. The case resulted in guilty pleas and numerous prison sentences. Dennis Hoffman appealed his sentence. His sentence was affirmed in United States v. Hoffman, 9 F.3d 49 (8th Cir. 1993). Hoffman was represented by Carter C. Law, Assistant Federal Public Defender, 1010 Market Street, Suite 200, St. Louis, Missouri 63101, (314) 241-1255.

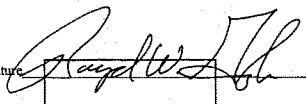
8. United States v. Matthew Trainer & Jason Trainer, Docket No. 4:01CR182 CEJ (Honorable Carol E. Jackson). This is an investigation and prosecution that I handled during 2000 and 2001 as an Assistant United States Attorney representing the government. The defendants entered guilty pleas to mail fraud charges related to their participation in an investment fraud scheme causing a loss of more than $2 million to approximately 40 victims. Both were sentenced to prison terms. Defendant Matthew Trainer was represented by Peter Cohen, Attorney at Law, 2734 Lafayette, St. Louis,

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Gruender, Raymond W	9/30/2003

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature  Date 9/30/03

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

   1. From approximately 1997 through 1999, I served as a member of the local District Court's Criminal Justice Act Lead Counsel Panel. As such, I made myself available, along with a number of other experienced criminal attorneys, to represent the indigent as appointed counsel in federal criminal matters. I was appointed two matters. Prior to that, I worked on various criminal and civil appointed matters (such as §1983 actions) as requested by the District Court and other attorneys in the law firms for which I worked.

   2. From 1990 to 1994, I served as the President of the Board of Directors, Vice President and Secretary of ALIVE (Alternatives to Living in Violent Environments), a not-for-profit organization dedicated to eliminating domestic violence. I devoted approximately 10 to 15 hours per month to this activity.

   3. Between 1997 and the present, I have served as a volunteer on the Allocations Committee of the Variety Club of St. Louis. The Variety Club raises and distributes funds to disadvantaged and disabled children in the St. Louis area. I devote approximately 5 hours per month to this project.

   4. Between 1999 and 2002, I served on the Board of Directors of the Shakespeare Festival of St. Louis, a not-for-profit organization dedicated to bringing professional-quality Shakespeare theater, free of charge, to St. Louis. I devoted approximately 5 hours per month to this project.

5. In 1995, I was appointed a member of an Advisory Committee to the St. Louis County Council on county government and county charter. This was a short-term project.

6. Between 1995 and 1999, I served as a member of Senator Ashcroft's Missouri Coalition on Crime and Violence.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

A. I was a member of the Veiled Prophet, a local civic, fraternal organization that sponsors the V.P. Parade and Fair St. Louis. To the best of my knowledge, there only are male members. I had minimal involvement in the organization, was not an officer or director and was not in a position to change its policies. It maintains an office and parade storage facilities. Meetings are conducted two times each year at a rented public facility. 1998 to 2003.

B. I also was a member of the Shamrock Club of St. Louis County, a fraternal organization, the sole purpose of which is to sponsor a dinner on St. Patrick's Day. I believe that all members are male. I was not an officer or director and was not in a position to change its policies. The single yearly meeting is held at a rented public facility. 1996 to 2003.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

To my knowledge, there was no selection commission. Shortly after hearing of the opening, I expressed my interest to Senator Bond's office. Subsequently, I was interviewed by

members of the Office of White House Counsel and a representative from the Department of Justice. Thereafter, I completed various forms and questionnaires. Then, I was interviewed by a member of the Department of Justice, Office of Legal Policy. Around the same time, I underwent an FBI background check. Finally, I was nominated on September 29, 2003.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The United States Constitution governs and limits the role of federal judges. Thereafter, the role of the federal judiciary is defined by Congress in the laws that it passes. Finally, precedent established by the United States Supreme Court and Circuit Courts of Appeals also govern and define the limits of the federal judiciary. Under the doctrine of "case or controversy," a judge generally should limit a ruling to resolving the matter at issue. Standing and ripeness are also are well-recognized requirements in deciding a case and should, likewise, be enforced.

Senator KYL. Judge Martinez, we are delighted to have you here. It was a wonderful introduction that you received, and now is your opportunity to make any opening statement you would like and introduce members of your family or friends who are here today.

STATEMENT OF RICARDO S. MARTINEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON

Judge MARTINEZ. Mr. Chairman, thank you so very much. I have no opening statement. However, I would love to introduce my family.

Senator Murray already told you about my wife and children, but let me have you meet them. First of all, my wife, Margaret; my oldest daughter, Lela, who is a student at Howard University right here in D.C.; my daughter, Jessica, graduating from high school this year and getting ready to play Division I soccer next year for Washington State University.

Senator KYL. Getting a plug in there for you, I can see.

[Laughter.]

Judge MARTINEZ. And my youngest daughter, Gabriela.

Also present today, my brother and sister-in-law, Walter and Cynthia Morris; their son, Walter Morris III; my other sister-in-law who flew in this morning from San Francisco, Alice Morris; and a friend and classmate of my daughter here at Howard University, Mr. Omar Raheem.

And, finally, in the back, the woman who makes my presence here possible because she is a friend, a colleague, and one of my mentors from out of my court. When she took the job as Director of the Federal Judicial Center, that is when this vacancy opened up. Judge Barbara Jacobs Rothstein.

Senator KYL. Great. Well, thank you all very much for being here in support of Judge Martinez.

[Applause.]

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Ricardo Salazar Martinez; I have also been known by the nickname "Ric" and was called "Richard" from age 6 to 18.

2. Address: List current place of residence and office address(es).

Residence: Washington

Office: Rm. 304 William Kenzo Nakamura
United States Courthouse
1010 Fifth Avenue
Seattle, Washington 98104

3. Date and place of birth.

June 23, 1951 at Mercedes, Texas

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married to Margaret (Morris) Martinez, board member for:

Washington State Indeterminate Sentence Review Board
4317 6th Ave S.E.
P.O. Box 40907
Olympia, WA 98504

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Washington School of Law
1997 - 1980
Juris Doctor - June 1980

University of Washington
1969 - 1975
B.S. Psychology - June 1975

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were

connected as an officer, director, partner, proprietor, or employee since graduation from college.

1998 - Present	U.S. District Court; Western District of Washington United States Magistrate Judge
1990 - 1998	King County Superior Court; Superior Court Judge
1980 - 1990	King County Prosecuting Attorney's Office; Assistant Prosecutor
1975 - 1977	Northwest Rural Opportunities; Job Developer for a non-profit corporation

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

- The Order of the Coif
- Judge of The Year - King County Women's Lawyers
- Judge of The Year - Asian Bar Association Of Washington
- Silver Gavel Award - WA State Hispanic Bar Association
- Outstanding Achievement By A Public Official Washington Council On Crime & Delinquency
- Governor's Certificate of Appreciation

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

- U.S. Court of Appeals, 9th Circuit Capital Case Committee
- Federal Magistrate Judges Association
- Civil Justice Reform Act Advisory Group
- Federal Bar Association
- Washington State Bar Association
- Superior Court Judge's Association
- King County Bar Association
- Washington State Hispanic Bar Association
- National Association of Drug Court Professionals
- The Washington State Minority and Justice Commission
- Washington State Sentencing Guidelines Commission

- American Prosecutor's Research Institute
- National College of District Attorneys
- National Interagency Counterdrug Institute
- Washington Association of Prosecuting Attorneys

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I don't belong to any lobbying organization. I am currently a member of the following organizations:

- Seattle University Regents
- Lake Washington Youth Soccer Association
- Alpha Omicron Boule (Seattle chapter of Sigma Pi Phi)
- First AME Church

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Washington State Supreme Court- Admitted September 1980, U.S. District Court for Western District of Washington- Admitted February 1984

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

I have one published article dealing with my experiences as a judge presiding over King County Drug Court. This was published in the November 1997 issue of the Washington State Bar News. A copy is attached.

While I have given numerous speeches throughout my legal career, none of them have dealt specifically with constitutional law issues. Several of my speeches have dealt with legal policy. I did not keep copies of them and, to my knowledge, none of them have been reported in the press. The following is a list of those speeches:

Date	Group Presented	Topic
06/1984	State Prosecutor's Ass.	White Collar Fraud
07/1989	Superior Court Judges Ass.	Gang Prosecution
09/1991	County Bar Ass.	Court Interpreters
04/1993	Superior Court Judges Ass.	Ethnic Diversity
03/1995	Salvation Army	Drug Courts
05/1995	County Bar Ass.	Law Day
09/1995	Superior Court Judges Ass.	Drug Courts
04/1996	County Bar Ass.	Drug Courts
08/1996	WA State Council on Crime	Drug Courts

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent health. Last physical examination was in September 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I was appointed to the King County Superior Court bench in Washington State in April of 1990. I stood for re-election in November 1990, again in 1992 and 1996. I was never opposed. I served as a general trial judge in the Civil, Criminal and Juvenile departments of superior court. During my more than eight years in superior court I had extensive experience in all aspects of case disposition including serving as the trial judge in a death penalty case.

On June 8, 1998, I was appointed as a United States Magistrate Judge for the Western District of Washington. U.S. Magistrate Judges are generalist judges with a broad range of responsibilities. In this district we perform many varied functions as requested by our district judges. Among these are:

- Presiding at civil jury trials by consent of the parties and imposing judgments;

- Presiding at criminal misdemeanor jury trials by consent and imposing sentences;
- Pretrial case management in complex civil cases;
- Conducting preliminary proceedings in felony criminal cases;
- Conducting settlement conferences;
- Hearing and determining pretrial motions;
- Hearing and recommending disposition of summary judgment and other case dispositive motions;
- Reviewing prisoner suits collaterally attacking sentences or challenging conditions of confinement; and
- Issuing arrest and search warrants.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

A). Most Significant Opinions.

As a magistrate judge I prepare reports and recommendations for the district judges. Therefore I am enclosing several of those R & R's that have been adopted in significant cases although any reported opinion would be in the name of the assigned district judge.

1. *In re Boeing Securities Litigation*
   Case No. C97-1715 (Zilly)

2. *Puget Soundkeeper Alliance v. City of Bremerton*
   Case No. C92-5540 (Coughenour)

3. *Lin Guo Xi v. INS*
   Case No. C00-739 (Zilly)

This case was ultimately reversed by the Ninth Circuit at 298 F.3d 832 (2002), although there is now a split in the circuits. *See Napoles v. INS,* (2003 WL 21999003, *4 (D.Conn.))

4. *Alexis Shumway v. Alice Payne*
   Case No. C96-1941 (Dwyer)

5. *United States v. John Wayne Zidar*
Case No. CR01-108 (Rothstein)

6. *Tina Gomes James v. Kenneth Apfel*
Case No. C00-614 (Rothstein)

7. *Patrick R. Donnelly v. United States of America*
Case No. C99-2048, CR98-354R (Rothstein)

8. *Joseph Meling v. United States of America*
Case No. C02-1288, CR92-395 (Rothstein)

9. *El Trevino Woods v. Richard Morgan*
Case No. C01-1394 (Coughenour)

10. *Andre B. Young v. Dennis Braddock, et al.*
Case No. C96-936 (Lasnik)

The following four citations, while they are not cases that I wrote, are significant cases where my rulings as a superior court judge were eventually appealed to, and upheld by, the Washington State Supreme Court.

State Superior Court Cases

1. *State of Washington v Cal Brown*
132 Wash. 2d 529, 940 P.2d 546 (1997)

2. *In the Matter of the Detention of Kenneth Dydasco*
135 Wash. 2d 943, 959 P.2d 1111 (1998)

3. *James Stanton v. Bayliner Marine Corporation*
123 Wash. 2d 64, 866 P.2d 15 (1994)

4. *State of Washington v. Erik Riles*
135 Wash. 2d 326, 957 P.2d 655 (1998)

B). Appellate Opinions (Reversed).

State of Washington v. Michael Nordstrom
89 Wash. App. 737, 950 P.2nd 946 (1998)

Defendant was charged with misdemeanor fourth-degree assault and convicted in King County District Court at a bench trial. Defendant appealed to the superior court alleging that his waiver of counsel at trial was not knowing and intelligent. Acting as the appellate judge I affirmed his conviction. The

state court of appeals disagreed, finding that, although defendant had been warned multiple times to obtain counsel before returning to court, that the record here failed to show that he knew and understood the risks of foregoing counsel and that he did not impliedly waive his right to counsel.

Douglas G. Baer v. City of Auburn
Unpublished (1997 WL 22419(Wash. App. Div. 1))

Defendant was convicted by a jury in Auburn municipal court with resisting arrest and obstructing a police officer. Defendant then tried to obtain counsel to represent him on appeal at the expense of the city. Several counsel were appointed who later withdrew when conflicts arose between them and defendant. He appeared before me in Superior Court and I advised him that he either needed to obtain counsel or perfect the appeal himself. He failed to do either and I dismissed the appeal. The appellate court reversed, finding that defendant had been deprived of his right to counsel, and reinstated the appeal.

State of Washington v. Kim Faun Seto
Unpublished (1998 WL 251806 (Wash. App. Div. 1))

In prosecution for a drug offense, defendant argued for dismissal based on double jeopardy. I concurred and dismissed based on an existing appellate case from another division. The plaintiff then conceded error when the state supreme court ruled that civil forfeiture of property used to facilitate a defendant's alleged drug offense did not barr subsequent prosecution.

City of Seattle v. Edmund Ramirez
Unpublished (1997 WL 177446 (Wash. App. Div. 1))

Defendant was convicted in municipal court of driving with a suspended license. He appealed and appeared before me in superior court arguing that he had never had a license at all, and therefore he could not be found guilty of this specific crime. I agreed with his logic and dismissed the case. The court of appeals reversed the decision based on the sufficiency of the evidence in the record. The court ruled that it did not have to answer the specific question as to whether an actual license is required by a defendant *before* it can be suspended.

State of Washington v. Charles Olson
Unpublished (1997 WL 457467 Wash. App. Div. 1))

Defendant was charged with DUI and the trial court dismissed when the State could not provide the arresting officer or the lay witnesses at a pretrial suppression hearing. The state appealed and the parties appeared before me in superior court. I affirmed the trial court finding no abuse of discretion. The appellate court reversed saying the appropriate remedy was suppression of the defendant's statements and not dismissal of the case.

City Of Seattle v. Russell Allen
80 Wash. App. 824, 911 P. 2nd 1354

Defendant was convicted of harassment and assault in municipal court. He appealed the harassment conviction to superior court where I affirmed. The court of appeals reversed, finding that his threats to shoot one victim because he did not do what defendant had told him to do and to shoot a second victim if he failed to do what defendant told him, were threats to cause immediate bodily injury and not threats to cause bodily injury in the future, thereby not sustaining convictions for harassment.

City of Seattle v. Ian Washburn
Unpublished (1997 WL 738896 (Wash. App. Div. 1))

Defendant was found guilty of DUI. He appealed and argued that his trial counsel had been ineffective for failing to object to an untimely arraignment that led to his trial being set outside of his speedy trial period. I reversed the trial court, finding that his counsel's failure to object to the untimely arraignment was ineffective assistance. The court of appeals reversed, finding that no prejudice was established by counsel's obvious deficient performance.

State of Washington v. Evans, et al.
80 Wash. App. 806, 911 P. 2d 1344 (1996)

Three defendants each assisted in the delivery of a small amount of cocaine. These three separate cases were consolidated on appeal. I, and the other two superior court judges on these cases, had found each defendant to have played a minor role in the transactions and sentenced below the standard range. The court of appeals reversed, finding in my case that the defendant's motive in facilitating the drug deal (to get a small piece of cocaine for himself) did not diminish his degree of involvement or make him less culpable for the crime.

State of Washington v. Adrin Christensen
Unpublished (1997 WL 428338 (Wash. App. Div. 1))

Defendant was convicted and sentenced for vehicular assault. Ninety days after sentencing I ordered her to pay restitution in an exact amount to the seriously injured victim. A year later, the state supreme court ruled that restitution orders must be entered within sixty days after the sentencing hearing. Defendant moved to reconsider her sentence and asked to delete the order of restitution. I denied the motion and she appealed. The court of appeals reversed and vacated the restitution order.

State of Washington v. Wayne Ferguson
Unpublished (1999 WL 71996 (Wash. App. Div. 1))

Defendant was convicted by a jury of second degree assault with intent to commit the felony of indecent liberties, and indecent liberties by forcible compulsion. The jury found that he was sexually motivated when he committed the assault. Defendant appealed, arguing that based on the specific facts in this case, his convictions for both offenses constituted double jeopardy. The court of appeals agreed and vacated the second degree assault conviction.

State of Washington v. Barry Henthorn
85 Wash. App. 235, 932 P. 2d 662 (1997)

Defendant was convicted in district court of DUI and sentenced as a second offender and he appealed. In superior court I reversed the sentence, finding that the State needed to properly allege or plead defendant's prior DUI in order to sentence him as a second offender. The court of appeals reversed, finding that neither due process nor the applicable statutes here required the State to plead defendant's prior convictions or to provide notice in order to increase his mandatory minimum sentence.

State of Washington v. Jason Smith
87 Wash. App. 345, 941 P.2d 725 (1997)

Motorist was found guilty of speeding and he appealed. I affirmed his conviction. Defendant appealed again and the court of appeals reversed holding that pilot who measured defendant's speed from the air lacked personal knowledge regarding the distance between aerial surveillance traffic marks on the highway.

Martin v. Triol
63 Wash. App. 862, 822 P.2d 342 (1992)

Plaintiffs brought automobile personal injury suit against defendants. I dismissed the complaint based on insufficiency of service of process and plaintiffs appealed. The court of appeals reversed and the defendant's appealed. The state supreme court reversed the COA in part and affirmed in part.

City of Bellevue v. Thomas Hard
84 Wash. App. 453, 928 P.2d 452 (1997)

Defendant was given a deferred sentence in district court for a DUI conviction and ordered to serve five days in jail. After the defendant served his time he violated other conditions of his sentence. The trial judge revoked the deferred sentence and imposed another conditional sentence of 365 days with 335 suspended. Defendant violated again and when brought before the court he argued that the sentencing court only had authority to impose the five days originally imposed. The trial judge disagreed and took defendant into custody. Defendant appealed and appeared before me in superior court. I reversed the trial court and the prosecuting municipality appealed. The court of appeals reversed, finding that the trial court was not prohibited from imposing more jail time, despite the existence of a statute stating that a court revoking a deferred or suspended sentence may not impose a sentence greater than the "original sentence."

State of Washington v. Mark Zumwalt
79 Wash. App. 124, 901 P.2d 319 (1995)

Defendant pled guilty to a charge of first-degree robbery while armed with a deadly weapon. He later moved to withdraw the plea in front of me and I denied the motion. He appealed and the court of appeals reversed the deadly weapon enhancement finding that no evidence existed in the plea agreement to find that the knife used at the time of the robbery met the statutory requirement for a deadly weapon.

State of Washington v. Steve A. Thein
138 Wash. 2d 133, 977 P.2d 582 (1999)

Defendant was convicted in superior court for possession of marijuana with intent to deliver and defrauding a public utility by stealing electrical power. Defendant appealed and the court of appeals affirmed. Defendant appealed again and the state supreme court reversed and remanded with an order to suppress the search warrant that had been issued by a magistrate, for lack of probable cause.

State of Washington v. Becker, Gant
132 Wash. 2d 54, 935 P.2d 1321 (1997)

Defendants were convicted by a jury in superior court for delivery of cocaine and their sentences were enhanced for proximity of drug trafficking to a school. Defendants appealed and the court of appeals affirmed their conviction and the special sentencing enhancement. Defendants appealed again and the state supreme court reversed holding that the "school" in this case was not a school within the meaning of the statute, that its location could not be readily ascertained by a defendant and that the special verdict form contained error.

Scott Sherman v. State of Washington
128 Wash. 2d 164, 905 P.2d 355 (1996)

Plaintiff sued the University of Washington school of medicine claiming illegal termination from a residency program. I granted summary judgement to plaintiff. The supreme court reversed and remanded for trial.

C). These are appellate court decisions on significant constitutional question that I addressed as a trial judge while in the superior court.

State of Washington v. Charles Noah
103 Wash. App. 29, 9 P.2d 858 (2000)

City of Seattle v. Susan Fontanilla
128 Wash. 2d 492, 909 P.2d 1294 (1996)

City of Seattle v. Edward Abercrombie
85 Wash. App. 393, 945 P.2d 1132 (1997)

City of Seattle v. Jon M. Lorang
92 Wash. App. 186, 963 P.2d 198 (1998)

City of Seattle v. Lloyd Stalsbroten
138 Wash. 2d 227, 978 P.2d 1059 (1999)

Additionally, as a Magistrate Judge I prepare reports and recommendations to the district judges on habeas and prisoner civil rights cases. I am referred approximately 30-40 of these cases per year and every one of them involves state and federal constitutional issues.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the

terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I have not run for or held any other public office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I have never served as a law clerk.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

King County Prosecuting Attorney's Office; 516 Third Ave. Seattle, Washington. I served as an intern in that office from 6/79 to 9/79 and as a deputy prosecutor from 6/1980 to 4/1990.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

After graduation from law school in June of 1980,I was hired as an assistant deputy prosecutor by the King County Prosecuting Attorney's office. My initial assignment was to a court of limited jurisdiction in a small suburb of Seattle. I was the sole prosecutor assigned to this district court and my job duties involved resolution of all criminal misdemeanor cases filed in that court. This meant daily appearance in court for arraignments, pleas, sentencings, etc., and a substantial number

of jury trials. The majority of jury trials involved alcohol related driving offenses. Many cases were resolved by pleas and I was responsible for making sentence recommendations to the court.

Approximately eight months later I was assigned to the King County Superior Court Juvenile division. I was one of several deputies, along with a supervising senior deputy, who was responsible for reviewing police reports and deciding whether charges should be filed against juvenile defendants as well as trying those cases. My job duties included daily appearance in court for many varied types of hearings as well as bench trials in both misdemeanor and felony cases. During the year that I spent at juvenile court I tried an average of 8 to 10 felony trials per week.

In mid to late 1982 I was assigned to the criminal felony division in Seattle. From then to mid 1986 I rotated through most of the different units in the prosecutor's office. For example, I did a stint in the filing/charging unit. This entailed working closely with more than 23 different law enforcement agencies in making case specific charging decisions. I was on a felony trial team where my duties were to continuously try felony cases. It was not unusual to be in trial at least four days out of every five during that time. At first, a new deputy is generally given more of the lower level felonies and then swiftly progresses to more serious offenses such as kidnaping, robbery and homicide.

In 1983 I was assigned to the Felony Fraud division where more significant white collar fraud cases were our specialty. I worked very closely with law enforcement and helped shape the direction of the investigation in any specific case. After filing charges I handled the case all the way through to final disposition including sentencing and appeal if necessary. While in that unit I was selected to be cross-designated as a special Assistant United States Attorney in order to be able to practice in federal court. I concentrated on prosecuting large scale drug offenders who were involved in multi-state, or even international, drug dealing. My trial rate dropped off substantially since most of these defendants would enter guilty pleas because of the thorough investigations and strong evidence. However, I was fully exposed to federal court and worked with many federal law enforcement agencies as well as specialized state and federal task forces.

In 1985 I was assigned to the adult sexual assault unit. This was a specialized unit that dealt with filing and trying child sexual abuse, domestic violence and adult sexual assault

cases. These cases are generally seen as the most difficult for any prosecutor due to the emotional impact on victims and families but also due to the minimal evidence available in many instances. These cases go to trial more often and are much more difficult for a prosecutor to get a conviction. These cases involved extensive contact with victims and very close working relationships with law enforcement specialists in sexual assault investigation.

In 1986 I was promoted to Senior Deputy Prosecuting Attorney and put in charge of a newly created unit that specialized in drug prosecution. At that time, drug charges in our county made up more than half of all of the criminal cases filed. My unit quickly grew to become the largest in the office in terms of the number of deputies assigned and cases resolved. At this time I was trying very few cases because of the heavy demands of my supervisory activities. I was in charge of all plea negotiations and final case disposition as well as making sentencing recommendations. I remained in this position until early 1990 when I was appointed as a King County Superior Court judge.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As a prosecutor I have represented the State of Washington and the United States of America. As indicated previously I have specialized in the areas of child and adult sex crimes, domestic violence, major drug prosecution, and white collar fraud cases.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

During my ten years as a prosecuting attorney, my main job responsibility was to appear in court and try cases. From June of 1980 to approximately March of 1981 while in the county district courts I appeared in court every day. In the juvenile division of superior court, from March of 1981 to June of 1982, I appeared in court on a daily basis. From 1982 to mid 1986, due to the heavy caseload in King county, I appeared in court almost on a daily basis as I tried an average of five to six felony cases per month. From 1986 to 1990 I was in charge of a large trial team and I appeared in court only five to six times per month.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

I estimate that 97% of my appearances were in state courts of record while the remaining 3% were in federal court.

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

100% of the cases I handled were criminal cases.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

I estimate that in my entire career I have easily taken more than 150 cases to trial. I have been sole counsel on more than 95% of these cases.

5. What percentage of these trials was:
   (a) jury;

Approximately 75% of these trials have been to a jury.

   (b) non-jury.

The remaining 25% of these trials were non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. *State of Washington v. Rick Melvin Peerson*

64 Wash. App. 123 (1991)
Hon. Anne Ellington, King County Superior Court
Aggravated Murder (2 Counts)/ Death Penalty Case

I was lead counsel on this 1989 trial involving a defendant charged with murdering two marijuana growers/dealers and the attempted murder of two others by a disgruntled former employee. My co-counsel was Dean Lum, now a judge on the superior court. I was responsible for all phases of trial strategy while co-counsel handled the bulk of the suppression motions filed by the defense. We split up questioning the witnesses and I did the opening statement as well as closing argument. The defendant was found guilty in the guilt phase of the trial and was sentenced to life imprisonment after the jury could not unanimously agree on imposing the death penalty (11 to 1). Ironically enough, this defendant later died in prison after serving approximately seven years of his sentence.

Opposing counsel were John Muenster, 999 Third Avenue, Seattle, WA. 98104 (206-467-7500) and Mark Mestel, 3221 Oakes Ave, Everett, WA. 98201 (425-339-2383).

Honorable Dean Lum, King County Superior Court, 516 Third Avenue, Seattle, WA 98104. 206-296-9295.

2. *United States v. Dahl, Kovacs, Sea-Pac Inc.*
CR84-0212M (1984)
Hon. Walter T. McGovern, U.S. District Court, WDWA

In 1984 I was a cross-designated special assistant working in the U.S. attorney's office and this was the first case that I tried in federal court. It involved two individual co-defendants and a corporation that were accused of buying Alaskan halibut caught out of season. Andrew Hamilton was the AUSA in charge of the prosecution and I was second chair. I was responsible for questioning half of the witnesses and I handled closing argument before the jury. We obtained convictions on Kovacs and the Sea-Pac corporation while Dahl was found not guilty.

Counsel for the defendants were as follows: *Dahl* - Murray Guterson, 600 University Street Ste. 2700, Seattle, WA 98101, 206-467-1816. *Kovacs* - William Fligeltaub, 2001 Western Avenue Ste. 200, Seattle, WA 98121, 206-343-9490. *Sea-Pac* - Bruce Rinker, (retired - no contact information available).

Andrew Hamilton, 601 Union Street, Suite 5100, Seattle, WA 98104, 206-553-4402.

3. *State of Washington v. Downey*
53 Wash. App. 543, (1989)
Hon. Mary Brucker, King County Superior Court
Winsor, Pekelis, Webster, Court of Appeals
Violation of The Uniformed Controlled Substances Act

This case involved the warrantless search of a residence that led to the discovery of an active methamphetamine lab. Meth production had become a real problem in our state and this appellate decision upheld the search as lawful under the emergency exception doctrine, thereby giving law enforcement another tool in enforcing drug laws. I was sole counsel on this case, responsible for all aspects of the trial as well as writing the appeal brief and arguing the case before the appellate court.

Appellate counsel was Allan B. Ament, 618 Fullerton Ave, Seattle, WA 98122, 206-910-3860.

4. *State of Washington, ex. Rel. Norm Maleng, Respondent*
v.
Aukeen District Court, et al., Appellants
31 Wash. App. 738, (1982)
Hon. Francis Holman, Superior Court Judge
Corbett, Anderson, Swanson, Court of Appeals

This case was one of the earliest appeals that I handled as a young prosecutor. It involved 34 separate defendants who had been charged with buying liquor at an Indian reservation and then transporting it off the reservation in violation of state law. The defendants argued that the Supremacy Clause of the United States Constitution should prohibit the State of Washington from enforcing the state statute because federal law allowed the tribal liquor store the right to sell liquor. The court of appeals did not agree with their arguments and upheld the State's right to prosecute. I was the sole prosecutor responsible for all aspects of the trial. I handled the appeal at the superior court level and I assisted co-counsel Doug Whalley before the appellate court.

Appellate counsel for the defendants was Jeremy Randolph, 360 NW North St., Chehalis, WA 98532, 360-740-1240.
Doug Whalley, 601 Union St. Suite 5100, Seattle, WA 98104, 206-553-4440.

5. *State of Washington v. Greene*
49 Wash. App. 49, 742 P.2nd 152 (1987)
Hon. Robert Elston, Superior Court Judge
Swanson, Webster, Coleman, Court of Appeals

Defendant was convicted of first-degree robbery and appealed arguing that the trial court had abused its discretion by continuing his case for one day due to the prosecutor's illness and that he'd been forced to choose between his right to speedy trial and right to effective assistance of counsel by the state's delay in providing defendant's own statement to his defense counsel. The COA disagreed as to both contentions and upheld his conviction. I was responsible for all aspects of trial and appeal.

Trial counsel for Greene was Michael Iaria, 1425 Western Ave Apt. 108, Seattle, WA 98101, 206-624-9694. Appellate counsel for the defendant was Neal Fox, 810 3d Ave Ste. 800, Seattle, WA 98104, 206-447-3900.

6. *State of Washington v. King*
47 Wash. App. 38, 733 P.2d 568 (1987)
Hon. Sharon Armstrong, Superior Court Judge

Defendant was convicted of four counts of second degree robbery and he appealed, arguing that all four robberies should have been determined to encompass the "same course of conduct" for sentencing purposes. The COA disagreed and dismissed his appeal. I was responsible for all aspects of trial and appeal.

Appellate counsel for defendant was Christine M. Hassentaub, Norwegian University of Science & Technology at Dragvall, Trondheim, Norway N-7491.

7. *State of Washington v. McGhee*
57 Wash. App. 457, 788 P.2d 603 (1990)
Hon. Terrence Carroll, Superior Court Judge
Forrest, Coleman, Scholfield, Court of Appeals

Defendant was convicted robbery in the first degree, attempted robbery in the first degree and felony murder in the first degree. He appealed, alleging improper admission of his threat against a witness, ineffective assistance of counsel and error by the trial court in not giving his proposed missing witness instruction. The COA affirmed all convictions and dismissed his appeal. I was responsible for all aspects of trial and appeal.

Appellate counsel for the defendant was Dennis Benjamin, 303 W. Bannock St., Boise, ID 83702, 208-343-1000.

8. *State of Washington v. Casal*

103 Wash. 2d 812, 699 P.2d 1234 (1985)
Hon. David Hunter, Superior Court Judge

Defendant was convicted of possession of marijuana with intent to deliver. He appealed and the COA affirmed, he appealed again and the state supreme court reversed, holding that the evidence was sufficient to remand the case for an in-camera hearing by the trial judge to review the veracity of the officer with regard to statements attributed to an informant. I was responsible for all aspects of trial and appeal. Defendant was convicted again after remand.

Appellate counsel for defendant was Thomas Tarpley, 137 Murray Blvd, Ste. 201, Hagatna, GU, 671-472-1539.

9. *State of Washington v. Roberts*
54 Wash. App. 1020 (1989)
Hon. Peter Steere, Superior Court Judge

Defendant was convicted of murdering a drug dealer who had spent the night at Robert's residence and then disposing of his body by dumping it into a local river. I was the lead attorney for the two week trial and my co-counsel was Cindy Smith. I was responsible for the trial strategy, witness preparation and closing argument. Ms. Smith did the opening statement and we split up the questioning of the witnesses.

Cindy Smith, 4088 Crystal Springs Drive, Bainbridge Island, WA 98110, 206-855-1153. Defense counsel was John Hicks, 614 1st Ave Ste. 400, Seattle, WA 98104, 206-622-9050.

10. *State of Washington v. Tucker*
32 Wash. App. 908, 651 P.2d 220 (1982)
Hon. Francis Holman, Superior Court Judge
Durham, Swanson, Williams, Court of Appeals

Defendant committed an assault as a juvenile but the case was not filed until after he had turned 18, thereby causing him to be convicted as an adult. He appealed, arguing that the charging delay was prejudicial and a violation of his speedy trial rights. I was responsible for the trial and I wrote the appellate brief. It was argued before the COA by my co-counsel, Chris Quinn-Brintnall. The judgement was affirmed by the COA.

Appellate counsel for the defendant was Bruce Beckwith, (no current information available). Ms. Quinn-Brintnall is now a judge with Division II of the Washington State Court of Appeals, 950 Broadway, #300, Tacoma, WA 98402, 253-593-5447.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

In early 1993, after my appointment to the superior court bench, it became obvious to me that there needed to be a better method for handling the large number of low level drug defendants (not dealers or sellers) that were filling up our criminal calendars. As the former head of the prosecutor's drug division I had been responsible for all drug cases filed and prosecuted. Many of these offenders would be routinely convicted, sentenced, spend time in jail or prison, then after release, relapse and eventually come through the criminal justice system over and over again.

I was aware that the state of Florida had started an alternative court that dealt specifically with attempting to reduce recidivism among drug offenders, and they referred to it as a "drug court". I scheduled a meeting with my former employer, the King County prosecuting attorney, to discuss the possibility of setting up such a court in our jurisdiction. As we learned more about how these courts operated we began to believe that we could make this type of court work in our state.

It took more than a year of concentrated effort, and the work of a 55 person committee representing every facet of local and state government, before we were able to prevail in setting up one of the earliest drug courts in the nation. I chaired the committee and I was responsible for selling the concept to many skeptical individuals, both in the courts and in government.

The premise was simple: a defendant charged with possession of drugs could choose to waive all of his constitutional rights and defer his case while he participated in an intensive year long treatment program for substance abuse. During this time, each defendant made numerous appearances in court so that we could track ongoing progress. If he successfully completed the program then the case was dismissed; if he failed, there was no trial. Instead, he was summarily found guilty by the court and sentenced as if he had been convicted by a jury.

I presided over that court for three years, and subsequent evaluations of our program showed a significant impact on reducing recidivism rates of the people who successfully completed treatment. More importantly, we gave defendants the ability to attack the underlying problem(their drug addiction) and gave them a chance to go on to lead more productive lives

outside of the criminal justice system. It is now an institutionalized part of the justice system in several counties in the state. Nationally there are well over 450 drug courts in operation.

Another significant legal activity that I have been involved in has to do with serving as a settlement judge in civil and criminal cases in my district. For the last five years I have handled approximately 30 to 40 settlement conferences a year, successfully resolving a substantial majority. Not only does this free up other judges' calendars, but it allows me to use more creative solutions to resolving cases than would be allowed through litigation. The parties are generally more satisfied because they are intimately involved in crafting a solution and it eliminates any subsequent appeal, thus lessening the burden on the entire justice system.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

None. While I did have state retirement benefits from my previous employment, I rolled those benefits over into other tax deferred funds.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

My financial investment strategy has been carefully developed in order to minimize any conflicts over the years that I have been a judge. This district has an existing institutional mechanism in place where each judge, working with our clerk's office, can identify any specific areas where a potential conflict might arise. The clerk's office initially screens all cases with this list in mind. There is then a secondary screening in my chambers in each case that we are assigned or referred. Financially, I have very few potential conflicts. In terms of counsel, because I do not come from a law firm, the same holds true. The only set of cases where I routinely recuse myself are cases filed by prisoners against the Indeterminate Sentence Review Board because my spouse is a board member. These are few in number.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

None.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends,

interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached net worth statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Never.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	5,000	Notes payable to banks-secured	6,000
U.S. Government securities-add schedule	0	Notes payable to banks-unsecured	0
Listed securities-add schedule	0	Notes payable to relatives	0
Unlisted securities--add schedule	0	Notes payable to others	0
Accounts and notes receivable:	0	Accounts and bills due	10,000
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid income and interest	0
Doubtful	0	Real estate mortgages payable-add schedule	288,000
Real estate owned-add schedule	500,000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts-itemize:	0
Autos and other personal property	170,000	car loan	11,000
Cash value-life insurance	0		
Other assets itemize:			
Bonds/Thrift Savings Plan	50,000		
Mutual Funds	27,000		
Money Market Accounts	111,000	Total liabilities	315,000
529 College Investing	29,000	Net Worth	577,000
Total Assets	892,000	Total liabilities and net worth	
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, co-maker or guarantor	0	Are any assets pledged? (Add schedule)	0
On leases or contracts	0	Are you defendant in any suits or legal actions?	0
Legal Claims	0	Have you ever taken bankruptcy?	0
Provision for Federal Income Tax	0		
Other special debt	0		

FINANCIAL STATEMENT – SCHEDULES

ASSETS

1. **Real Estate**

   Family residence only

2. **Other assets**

   Bonds

   Thrift Savings plan

   Mutual Funds

   AIM Weingarten Mutual Fund
   American Funds Group – Mutual Investors Fund A

   Money market account

   American Funds Group – Cash Management Trust of America-A

   College Trust funds

   529 College Investing Fund – Franklin Templeton Investments

LIABILITIES

1. **Real estate mortgage payable**

   Family residence only

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I am the son of former migrant workers. My earliest memories are of being in some sort of field, cotton, strawberries, raspberries, cucumbers, etc., in one of several states, Texas, California, Oregon or Washington. My parents worked very hard at trying to earn a living. My entire family lived in a two room cabin in a migrant camp for several years. We had no indoor plumbing or running water. I know very well, what it feels like to be "disadvantaged".

For this reason, I have never needed a code of professional responsibility to remind me of the importance of giving to others who need help. Throughout my adult life I have routinely volunteered in activities that would help others in my community. I have worked in soup kitchens, setting tables, distributing food and even washing dishes as we fed the homeless. For more than fifteen years I have given hundreds of hours of my time coaching teams in soccer, basketball and track and field for the local boys and girls clubs. I have helped to deliver bags of food to the needy during holiday periods. I have helped my spouse, in preparing and delivering baskets of toiletries, soap, shampoo and various personal grooming items, to low income women and victims of domestic abuse. I am a member of a fraternal organization that has as its main goal, raising money for college scholarships for young men from disadvantaged backgrounds. This is so important to us as a family that my wife and I have taken steps to make sure that our own children understand the importance of giving their time to help others in their community.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I do not belong, nor have I ever belonged, to any group like this.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is a bipartisan selection committee in my jurisdiction and I was the candidate recommended by that committee.

I have been a magistrate judge for five years in this jurisdiction. When an opening came up for the district judge position I was encouraged by all of our current district judges to submit an application. I then submitted a curriculum vitae along with a letter of interest and references, to the committee. After an initial screening they agreed to interview eleven potential candidates. After these interviews they formally selected three candidates to recommend. The three of us were then asked to interview with White House counsel in Washington, D.C. After that interview each of us was interviewed by our current state senators. I was subsequently informed by the White House that I had been selected as the prospective nominee.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue,or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Alexander Hamilton observed that federal judges have neither force nor will, only judgment. In other words, it is the role of Congress to make the law, it is the President's role to enforce it, but judging is a much more passive process. A judge, as a neutral arbiter, must faithfully determine whether in any given case, the law is being properly enforced. In the relatively few cases where the district court must determine the correct interpretation of a law as a case of first impression then the judge must do so by faithful adherence to the language of the United States Constitution, enacted statutes and superior court precedent.

The duty of a federal judge is to make sure that in any case properly before the court, that the relevant facts are accurately established and the law faithfully applied to those facts. The focus is on that particular case and the parties before the court. A specific decision in any given case, while it may have tremendous consequences to the parties, should never be used as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals. It is not the role of a judge to determine what is "best" for government or society.

Senator KYL. I am going to interrupt just briefly, if we could, because Senator Jim Talent from Missouri is here, and I think he will want to follow the kind introduction that Senator Bond made for Mr. Gruender. And then I am going to turn the gavel over to Larry Craig for just a moment here while I have to take a call. So if we could just interrupt the process here and, Senator Talent, the floor is yours.

PRESENTATION OF RAYMOND W. GRUENDER, NOMINEE TO BE CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT, BY HON. JAMES TALENT, A U.S. SENATOR FROM THE STATE OF MISSOURI

Senator TALENT. Well, I thank you, Mr. Chairman, and I am grateful to the witnesses for allowing me to—well, let's just say it—interrupt here for a minute or two and to have an opportunity to say a few words about a good friend and a good man whom the President has nominated to the court of appeals.

I know Senator Bond wanted to—he and I kind of fought over who would get to say the most about Ray, and he went on, I know, at some length in going through Mr. Gruender's qualifications and his background, his beginnings, the way he worked his way through Washington University, through the law school there, his outstanding performance as a private attorney, his work as the United States Attorney, his faithful adherence to the law, and his faithful enforcement of the law for a number of years. I do not know a person who is more honest and who has more integrity in his private dealings as well as his public dealings. He is a man of great compassion.

One of the reasons I got to know Ray was his involvement in an issue that I have also been involved with over the years, at least marginally, in private life but also in public life, his work as the board president of ALIVE, which is a group that promotes alternatives to living in violent environments for people who have been the victims of domestic abuse. He is a well-rounded person, a great lawyer, a person who I am convinced, Mr. Chairman, and I hope the Committee and the Senate come to believe will render unbiased and unprejudiced judgments in the cases that come before him, according to his lights, who will be consistent in application of his jurisprudence without regard to outcome, and who will be faithful in interpreting the Constitution and the laws.

I just think he is a great nomination, and I hope that the Committee will proceed expeditiously to approve him.

Senator KYL. Thank you very much, Senator Talent.

Incidentally, Judge Martinez, you had indicated you had a statement, and you introduced your family first. If you want to make any other remarks, you are certainly welcome to do so at this time.

Judge MARTINEZ. No, thank you, Mr. Chairman. What I said was I had no opening statement.

Senator KYL. Oh, I am sorry.

Judge MARTINEZ. And it is a tremendous honor and privilege to be here today.

Senator KYL. Okay. Thank you.

Gene Pratter, welcome, and likewise you can make an opening statement and introduce friends and family, if you would like.

STATEMENT OF GENE E.K. PRATTER, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Ms. PRATTER. Thank you, Mr. Chairman. While I do not have an opening statement, I would like to take the opportunity to thank you for having the hearing. I am thrilled to be here, and I am even more thrilled to introduce to you my family and two of my colleagues.

First, my husband, Bob Pratter, Robert Pratter; our daughter, Paige Pratter, who works here in Washington, D.C., clerking for a district court judge on the Federal court here; and our son, Matthew Pratter, a freshman at Duquesne University. He is particularly happy to be here in his brand-new shoes. My partner, Sheila Hollis, who practices at Duane Morris' Washington, D.C., office. Sheila, will you stand? There she is. And my long-time legal assistant, Rose Barber, who took the train early this morning to be here, and I can't tell you how important Rose has been to me and to my family over the last decade.

Senator KYL. We thank you all for being here.

[Applause.]

[The biographical information follows:]

Questionnaire For Nominees Referred
To The
United States Senate Committee on the Judiciary

Response of Gene E.K. Pratter

I. Biographical Information (Public)

1. Full name (include any former names used.)

Response: **Gene E.K. Pratter**
Previous Married Name: Gene E.K. Bruton (8/71 to 10/78)
Maiden Name: Gene Ellen Kreyche

2. Address: List current place of residence and office address(es).

Response: **Residence:** **Bryn Mawr, Pennsylvania**

Office Address: **Duane Morris LLP**
One Liberty Place
1650 Market Street
Philadelphia, PA 19103-7396

3. Date and place of birth:

Response: **February 25, 1949 Chicago, Illinois**

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Response: **Married to:** **Robert L. Pratter**
Husband's Occupation: **Attorney/Business Executive**
Husband's Employer: **PMA Capital Corp.**
General Counsel and
Senior Vice President
1735 Market Street
Philadelphia, PA 19103

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Response: **Stanford University**
Attended 9/67-6/71
A.B. awarded June 1971

University of Pennsylvania Law School
Attended 9/72-5/75
J.D. awarded May 1975

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Response: **Duane Morris LLP (formerly known as Duane Morris & Heckscher LLP)**
Summer Associate: 6/74-8/74
Part-time Law Clerk: 9/74-5/75
Associate: 9/75-12/83
Partner: 12/83 to present
General Counsel: 1999 to present

Duane Morris, MNP
(London affiliate)
Multinational Partner: June 2000 to present

Philadelphia Probation Department
Law Clerk 6/73-8/73

University of Pennsylvania Office of Admissions
Clerical Assistant 2/72-9/72

University of Pennsylvania Law School
Overseer: 1993-1999

The Baldwin School
Trustee: 1989-1998

The Children's House
Montessori School
Trustee: 1987-1991
Board President: 1989-1991

Philadelphia Court of Common Pleas
Settlement Master/Judge Pro Tem
(voluntary service; ad hoc appt.): (est.) early 1990's to present

District Court for the Eastern District of Pennsylvania
Mediator
(voluntary service; ad hoc appt.): (est.) mid-1990's to present

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Response: No military service.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Response: College-related scholarships/honor society membership:
Junior Achievement Scholarship 1967
LaHabra, Calif. Rotary Scholarship 1967
Cap & Gown Scholarship 1970-71
Cap & Gown Honor Society (women's academic honor society at Stanford University)

9. Bar Associations List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Response:

American Bar Association – 1976 to present
Section of Litigation – (est.) 1980 to present
Co-chair, Committee on Ethics and Professional Responsibility (1994-1998)
Task Force on the Independent Lawyer (1995-2001) (Co-Chair, 1999-2001)

Tort and Insurance Practice Section – (est.) 1990 to present
Business Law Section – (est.) 1999 to present
Center for Professional Responsibility (est.) 1995 to present

Pennsylvania Bar Association – 1976 to present
Civil Litigation Section – (est.) 1993 to present
Women In the Profession Committee – (est.) 1998 to present
Education Law Section – (est.) 1992 to present
Mentor, State Civil Procedure Committee – (est.) 1995-1997

Philadelphia Bar Association – 1976 to present
Professional Responsibility Committee – 1997 to present
Professional Guidance Committee – 1997 to present (Chair - 1999-2001)

Association of Professional Responsibility Lawyers - 2000 to present

Defense Research Institute - (est.) 1985 to present

Pennsylvania Defense Institute - (est.) 1987 to present

Philadelphia Bar Foundation – intermittent annual membership, 1977 to present

University of Pennsylvania Law School
Board of Overseers – 1993-1999
Inn of Court (Master) – 2000 to present
National Chair, Annual Giving Campaign, 1998-1999
Chair, Benjamin Franklin Society, 1997-1998
Alumni Association – 1975 to present

The Federalist Society – (est.) 1994 to present

St. Thomas More Society – (est.) 1985 to present

Junior Legal Club – 1998 to present

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Response: I belong to no organizations that are active in lobbying before public bodies to my knowledge, although I believe that the American Bar Association and Community Legal Services, for example, are active in advocating before certain regulatory or other governmental agencies on issues relating to lawyers and certain legal policy issues. I have not participated personally in those efforts.

Other non-law related organizations to which I belong currently that are not listed in item 9 above:

St. John Vianney Church
Philadelphia Museum of Art
Zoological Society of Philadelphia
Stanford University
Alumni Association – 1971 to present
Stanford Philadelphia Club – 1974 to present
(President, est. 1983-85)
Cap and Gown Society – 1970 to present
Pennsylvania Horticultural Society
The Philadelphia Orchestra Association
Nantucket Historical Association
Pennsylvania Academy of Fine Arts
Academy of Natural Sciences
American Association of University Women
Various other charitable or non-profit organizations that

acknowledge contributions with "memberships" such as the Statue of Liberty Ellis Island Foundation, National Constitution Center, America's Foundation, WHYY Public Broadcasting, The Trustees of Reservations, Metropolitan Museum of Art, 'Sconset Trust, etc.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Response:

Supreme Court of Pennsylvania, October 1975 (no lapses)

United States District Court for the Eastern District of Pennsylvania, October 1975 (no lapses)

United States Court of Appeals for the Third Circuit, April 1981 (no lapses)

In addition, over the years I have been admitted pro hac vice in various state and federal courts in New York, Connecticut, Delaware, New Jersey, Illinois, Texas, Maryland, and Ohio in connection with certain cases as needed.

I also hold the designation of Registered Foreign Lawyer/MultiNational Partner issued in the U.K. and supervised by The Law Society. By this designation I am permitted to be and am a member of Duane Morris, a firm of solicitors practicing in the United Kingdom, which is an affiliate of the law firm in which I am a partner.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Response:

A. Publications:

"Ancillary and Multidisciplinary Businesses – Some Observations and Considerations," Pennsylvania Bar Institute's *How to Make Money Ethically Through Ancillary Businesses*, Philadelphia, Pennsylvania, May 9, 2002.

"Ethics and Professional Conduct", published in Risk and Recovery 2002, Developments in Bankruptcy, Reorganization and Commercial Finance Law, published May 1, 2002 by Duane Morris LLP.

"Ethics, Conflicts and Engagement Letters," Insurance Society of Philadelphia Continuing Legal Education, Philadelphia, Pennsylvania, February 20, 2002.

"Ethics and Professionalism – Issues for Inside Corporate Counsel," Insurance Society of Philadelphia's Continuing Legal Education, Philadelphia, Pennsylvania, December 5, 2001.

"Ethical and Legal Adventures for the Lawyer-Venture Capitalist," Pennsylvania Bar Institute's *Private Equity and Venture Capital Financing*, Philadelphia, Pennsylvania, July 11, 2001 and May 17, 2001.

"Sharing Equity With Your Legal Counsel-Benefit or Boondoggle," Women's Investment Network, Philadelphia, Pennsylvania, June 28, 2001.

"Professional Responsibility and Ethics", published in *Developments in Bankruptcy, Reorganization and Commercial Finance Law*, published May 1, 2001 by Duane, Morris & Heckscher LLP.

"Professional and Ethical Challenges of Electronic Communications," Pennsylvania Bar Institute's Technology Institute *Ethics: Using the Internet to Market Your Practice*, Philadelphia, Pennsylvania, February 22, 2001.

"Advanced Legal Ethics and the Internet - - Professional and Ethical Challenges of Electronic Communications", Pennsylvania Bar Institute Technology Institute, Philadelphia Convention Center, February 4, 2000 and February 22, 2001.

"Ethical Risks & Practical Benefits of Investing In or With Clients", Continuing Legal Education Program by The Insurance Society of Philadelphia, November 9, 2000.

"Maintaining Confidentiality and the Attorney-Client Privilege", PBI-PBEC Education Center, July 20, 2000.

"Professional Responsibility and Ethics", published in *Developments in Reorganization and Commercial Finance Law*, published May 1, 2000 by Duane, Morris & Heckscher LLP.

Contributor, "Lawyers' Investments In Their Clients", published by the ABA Litigation Section, 2000.

"A Letter To My Daughter", Volume 62 of *The Philadelphia Lawyer*, Spring, 1999.

"Professional Responsibility and Ethics", published in *Developments in Reorganization and Commercial Finance Law*, published May 1, 1999 by Duane, Morris & Heckscher LLP.

"Trial of a Legal Malpractice Action: Causation and Damages", published by Pennsylvania Bar Institute, June 1998.

"Professional Responsibility and Ethics", published in *Developments in Reorganization and Commercial Finance Law,* published May 1, 1998 by Duane, Morris & Heckscher LLP.

"Historical Roots of Lawyers' Professional Independence", published by ABA Litigation Section, March 1998.

"Professional Responsibility and Ethics", published in *Developments in Reorganization and Commercial Finance Law*, May 1, 1997 by Duane, Morris & Heckscher LLP.

Co-author, "Jumping Ship: Practical and Ethical Issues," published by ABA Litigation Section, April 1997.

"Professional Responsibility and Ethics", published in *Developments in Reorganization and Commercial Finance Law*, May 1, 1996 by Duane, Morris & Heckscher LLP.

"Bankruptcy Court Application of Ethics Rules and Standards of Conduct," *Bankruptcy Litigation* (October 1995).

"Professional Responsibility and Ethics", published in *Developments in Reorganization and Commercial Finance Law*, published May 1, 1995 by Duane, Morris & Heckscher

"Professional Ethics in the Bankruptcy Context," *Bankruptcy Litigation* (October 1994).

"Professional Responsibility and Ethics", published in *Developments in Reorganization and Commercial Finance Law*, published May 1, 1994 by Duane, Morris & Heckscher

"Design Engineers - Responsibilities During Construction," *Journal of Construction Engineering*, Vol. 112, No. 3, September 1986.

"Accountants' Professional Liability," Society of Chartered Property and Casualty Underwriters, Monograph, Fall, 1983.

I have authored several other articles that have been privately circulated to clients, industry representatives, lawyers and the like on a variety of topics concerning legal developments in a number of areas, including affirmative action, bankruptcy law, insurance regulatory law and professional services firm loss prevention. Generally, these papers were presented in conjunction

with seminars, workshops and speaking engagements and were not published. They were similar in tenor and type to those listed above.

B. Speeches from personal notes and without written text other than listed above:

Co-Presenter and Panel Moderator, "Professionalism and the Lawyer-Client Relationship: The View From In-House Counsel's Chair," Continuing Legal Education seminar, Philadelphia, Pennsylvania, March 20, 2003.

Presenter, "New Tax Shelter and List Maintenance Requirements," Philadelphia, Pennsylvania, Pennsylvania Bar Institute Continuing Legal Education seminar, March 10, 2003.

Quoted in the article "Sorting Out Sarbanes-Oxley: Determining How to Comply with the New Federal Disclosure Law for Corporations Won't Be Easy," *American Bar Association Journal*, February 2003.

Panelist, "Learning to Live with Sarbanes-Oxley," ABA Teleconference to 3700 participating lawyers, Chicago, Illinois, February 19, 2003.

Panelist, "What To Do When the Law Says 'No' But the Client Says 'Go,'" ABA Section of Business Law, Palm Beach, Florida, January 10, 2003.

Presenter, "The Sarbanes-Oxley Act of 2002 and the SEC's Proposed Regulations Regarding Professional Conduct of Attorneys Appearing and Practicing before the SEC," Philadelphia, Pennsylvania, December 17, 2002.

"The Attorney/Client Privilege Today," Business Lawyers' Institute 2002 Seminar, Philadelphia, Pennsylvania, October 16-17, 2002.

Co-Presenter, "Successful Partnering Between Inside and Outside Counsel: Advice From the Experts," Central Pennsylvania Chapter of the American Corporate Counsel Association, Harrisburg, Pennsylvania, May 17, 2002.

"Ancillary and Multidisciplinary Businesses – Some Observations and Considerations," Pennsylvania Bar Institute's "How to Make Money Ethically Through Ancillary Businesses", Continuing Legal Education seminar, Philadelphia, Pennsylvania, May 9, 2002.

Speaker, "Doing Merger and Acquisition Transactions in Today's Business Climate," Bisel CLE Institute, Philadelphia, Pennsylvania, April 16, 2002.

Co-Presenter, "Clarence Darrow Crimes, Causes & the Courtroom," Pennsylvania Bar Institute, Philadelphia, Pennsylvania, April 4, 2002.

Presenter, "Ethics, Conflicts and Engagement Letters," The Insurance Society of Philadelphia, C.L.E.Philadelphia, Pennsylvania, February 20, 2002.

Speaker, "Ethical, Malpractice and Practical Issues Relating to Retention, Destruction and Disclosure of Client Files," Midyear Meeting of the Association of Professional Responsibility Lawyers, Philadelphia, Pennsylvania, February 1, 2002.

"Ethics and Professionalism – Issues for Inside Corporate Counsel," Insurance Society of Philadelphia's Continuing Legal Education, Philadelphia, Pennsylvania, December 5, 2001.

"Harassment Update" and "WARN Act Warnings," Pennsylvania Business Lawyers' Institute, Philadelphia, Pennsylvania, November 28 and 29, 2001.

Presenter, "Lawyers Investing in Clients," Pennsylvania Business Lawyers' Institute, C.L.E. Philadelphia, Pennsylvania, November 28 and 29, 2001.

Panelist, "Ethical and Practical Implications of "Unbundling" Legal Services and Ancillary Businesses," Professional Liability Underwriting Society Conference, Chicago, Illinois, November 2001.

Presenter, "Ethical and Legal Adventures for the Lawyer-Venture Capitalist," Pennsylvania Bar Institute's *Private Equity and Venture Capital Financing*, Philadelphia, Pennsylvania, July 11, 2001 and May 17, 2001.

Presenter, "Sharing Equity With Your Legal Counsel-Benefit or Boondoggle," Women's Investment Network, Philadelphia, Pennsylvania, June 28, 2001.

"Advanced Legal Ethics and the Internet - - Professional and Ethical Challenges of Electronic Communications", presented for Technology Institute, Philadelphia Convention Center, February 4, 2000 and February 22, 2001.

Panelist, "Lawyer Independence", ABA Annual Meetings, August 1997, 1998 and 2000:

"Maintaining Confidentiality and the Attorney-Client Privilege", PBI-PBEC Education Center, July 20, 2000.

Co-Presenter, "The Practice of Law and Professional Responsibility: Issues in the 21st Century", Fifty-Seventh Judicial Conference of the Third Circuit, Philadelphia, May 1997.

Co-Presenter, "Jumping Ship: Practical and Ethical Issues for Litigators Thinking of Switching Firms", ABA Section Annual Meeting, Washington, D.C., April 1997.

Speaker, "Affirmative Action After Adarand: A Forecast for 1996 and Beyond," Human Resource Managers and In-House Counsel, The Rittenhouse Hotel, March 20, 1996.

Panelist, Program on Professional Ethics, ABA Annual Meeting, Orlando, Florida, August, 1996.

Speaker, "Ethics and Professional Duties," Pennsylvania Bar Institute's Annual Program on Developments in Federal Practice, November 1995.

Co-Presenter, "Professionalism," Philadelphia Bar Association's Annual Basic Legal Practice Seminar, November 1995.

Faculty, "Alternatives to Litigation: The 90's Approach", The Philadelphia Bar Education Center Seminar for C.L.E. and C.P.E. credit for lawyers and accountants, October 11, 1995 (author of video-taped dramatization and discussion leader).

Speaker, "What To Do Before The Lawyer Arrives," CPE Breakfast Seminar series sponsored by The CPA Association of New Castle County, Delaware, Delaware, July 1995.

Speaker, "Business Ethics," 1993 Education Conference sponsored by The Philadelphia Association of Paralegals, October 1993.

Panelist, "The Code of Professional Responsibility Provisions on Confidential Client Communications and a Lawyer's Obligations Concerning Disclosure of Criminal or Other Deleterious Conduct," ALAS Annual Meeting Loss Prevention Seminar, Banff, Alberta, Canada, June 1992.

Panelist, Philadelphia Bar Association, "Breaking Through the Glass Ceiling," Fall 1990.

American Bar Association, Litigation Section, Fall Meeting October 1990 (Professional Responsibility and Ethics topics, Women in the Legal Profession).

Lecturer or presenter on Construction Litigation, Risk Prevention and Contract Drafting, National Convention of Women Construction Owners and Executives, Washington, D.C., May 1987.

Lecturer to various professional and trade associations on selected topics, including:

> **International Society of Appraisers (The Duties of Expert Appraisers, Testimony and Reports in Litigation Cases).**
>
> **Philadelphia Chapter, Pennsylvania Institute of Certified Public Accountants (Accountant Liability and Risk Management).**
>
> **Philadelphia Chapter, National Society of Professional Engineers (Architect/Engineer Liability and Liability Insurance).**
>
> **American Institute of Architects, Philadelphia Women's Chapter (Liability for Construction Management).**

General Building Contractors Association, Pennsylvania Chapter (Claims Prevention, Minority Business Enterprises, Claims Presentation, Insurance Coverage).

13. Health: What is the present state of your health? List the date of your last physical examination.

Response: My present state of health is very good. Date of last physical examinations: May and September 2002. Up-dated examination in connection with this process to be scheduled and completed in early November 2003 based upon doctor's availability.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Response: I have not held any judicial office. However, starting in approximately the early 1990's I was appointed by the Administrative Judge for the Court of Common Pleas for Philadelphia County to serve as a Settlement Master and Judge Pro Tem in connection with various delay reduction programs. Similarly, in the mid 1990's I was appointed by the Chief Judge for the District Court for the Eastern District of Pennsylvania to serve as a Mediator for civil cases. Within the last several months I was requested by Chief Judge James Giles to apply for renomination to continue with that service to the Court.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court ruling on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Response: Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office

Response: None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Response:

Immediately following graduation from the University of Pennsylvania Law School and taking the Pennsylvania Bar Examination I started work in September 1975 at Duane Morris & Heckscher (now Duane Morris LLP) where I have worked continuously to the present in the following capacities:

Associate: 1975-1983
Partner: 1983 to present
General Counsel: 1999 to present

Duane Morris & Heckscher
Land Title Building
100 South Broad Street
Philadelphia, PA 19110
(1975-1980)

Duane Morris & Heckscher
One Franklin Plaza
16th & Race Streets
Philadelphia, PA 19103
1980-1990)

Duane Morris & Heckscher LLP
Duane Morris LLP
One Liberty Place
1650 Market Street
Philadelphia, PA 19103-7396
(1990 to present)

17.b.1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Response:

1975-1978: As a young associate in a multifaceted law firm, I generally performed support functions for senior trial partners, principally Henry T. Reath, John B. Martin, Reeder R. Fox, and (now U.S.D.J.) Michael M. Baylson. The majority of my work concerned commercial litigation, non-

medical professional negligence matters, construction disputes, securities class actions and antitrust actions. My activities included legal research, drafting briefs and memoranda, preparing and responding to written discovery, interviewing or preparing witnesses and accompanying and assisting the senior attorneys at depositions and in court.

1978-1982: As a senior associate, I worked with senior trial partners in significant cases of the same type outlined above, but with greater independence, i.e., solo court appearances for motions, evidentiary hearings, appellate arguments, and independent responsibility for client contact. I also handled some cases on my own and supervised younger attorneys.

1983-1990: These were years of considerable growth at our firm. As a young partner, I maintained an active litigation case load of increasingly complex matters with primary, and generally exclusive, responsibility for cases and clients. My work broadened into areas of counseling other professional firms and business clients and certain transactional representation in addition to litigation. I supervised several junior attorneys, began to publish articles, present speeches and programs and assumed various administrative and managerial duties within the firm, including primary responsibility for ethics, loss prevention, and hiring.

1991-Present: The last twelve years have brought many substantive changes to litigation and to the practice of law generally. My practice has incorporated many of those changes. In my early career, most of my work was defense-oriented, but over the years my litigation engagements have become evenly divided between representing civil action plaintiffs and defendants, depending on the nature of the dispute. While I continue to be active in a range of commercial, fiduciary, and professional responsibility litigation and some specialized regulatory and constitutional work, I now also spend a considerable amount of time counseling clients in alternate dispute resolution areas, professional and business ethics, transactional negotiations and litigation "avoidance". I am the senior attorney on all matters that I handle. Occasionally, I am part of a team of multi-disciplinary lawyers, and in such instances, I am generally the senior litigation partner. Within our firm I now serve as a permanent member on our firm's governing Partner's Board and as our firm's General Counsel. In this capacity, in addition to customary duties of a general counsel, I am primarily responsible for loss prevention and professional responsibility for our firm's 22 different offices with approximately 550 attorneys in 12 different jurisdictions and some dozen ancillary businesses owned by our firm. My civic, charitable and related public activities of interest to the firm have expanded greatly.

17.b.2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Response:

Typical Clients: Law firms and practicing lawyers, accounting firms, fiduciaries, financial institutions, bio-tech and other closely-held entrepreneurial enterprises, manufacturers, architects, engineers, construction contractors, insurers and reinsurers, insurance agents and brokers, all types of employers and employees, minority shareholders, non-profit entities such as the Philadelphia Zoo, educational institutions, and corporate directors and officers.

Areas of Professional Concentration:

Professional Liability and Professional Responsibility - Attorneys, Accountants, Design Professionals, Agents and Brokers

Fiduciary Liability - Trustees, Directors and Officers

Professional, Business and Government Ethics

Employment Litigation

Education Law

Family and Closely-Held Corporations; Shareholder Disputes

Insurance and Reinsurance Regulatory and Coverage Matters

Construction Contracts

Commercial Litigation (including Intellectual Property)

Alternate Dispute Resolution

17.c.1 . Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Response: In addition to several engagements as an expert witness in lawyer liability cases, in the last ten years, for example, I appeared in court (or an equivalent forum) in approximately three matters per month on average, depending upon the demands of the specific cases and clients. The actual amount of time in court varies with the activity and the case. These appearances include trials and injunction actions, presentation of or opposition to motions, arguments, hearings, appellate arguments, and routine conferences. In the last few years, I have endeavored to send junior colleagues to court appearances where and when appropriate, out of consideration for clients' concerns for economy and for the professional development of younger lawyers.

17.c.2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

Response: **(1) Federal courts – approximately 40%-50%;**
(2) State courts of record – approximately 40%;
(3) Other, e.g., arbitration; A.D.R.; administrative or regulatory agencies, etc. – approximately 10%-20%

17.c.3. What percentage of your litigation was:

(a) civil;
(b) criminal.

Response: **(1) Civil – 85%;**
(2) Criminal or Administrative – 15% (e.g., Licensing Boards, Disciplinary Committees etc.)

17.c.4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Response: Early in my career I was the assigned associate or junior partner assisting chief trial counsel in three civil cases tried to verdict and approximately a dozen cases concluded by pre-trial or post-close of evidence dismissals or by entry of summary judgment.

In the last approximately eight or nine years, I was sole or senior trial counsel for civil defendants in three jury trials, two in which directed verdicts were entered at the close of the plaintiffs' cases, and one that settled before closings. I was senior trial counsel in three civil non-jury trials and one contested case in a bankruptcy proceeding (non-jury) that settled after verdict while appeals were pending. In addition, I estimate I served as sole or chief counsel in ten administrative agency, licensing revocation or arbitration matters that concluded by administrative order or arbitration award. By far, most of the cases I have started were, like most civil litigation generally, settled prior to entry of a verdict or judgment.

17.c.5. What percentage of these trials was:

(a) jury;
(b) non-jury.

Response: **(1) Jury – 33%**
(2) Non-Jury – 33%
(3) Administrative – 33%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket

number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented, describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Response:

1. **BAKER, et al v. SUMMIT BANK**

United States District Court for the Eastern District of Pennsylvania Civil Action No. 99-CV-2010; defense summary judgment affirmed by the Third Circuit Court of Appeals at 01-4438.

Representing:	**Summit Bank, N.A.**
Trial Judges:	**The Honorable Edmund V. Ludwig and the Honorable Bruce W. Kauffman**
Supervising Magistrate:	**The Honorable Diane M. Welsh**
Trial Period:	**Secured Summary Judgment for client following close of discovery**
Opposing Counsel:	**Ellen Meriwether, Esquire J. Dennis Faucher, Esquire Miller Faucher Cafferty and Wexler LLP One Penn Square West 30 South 15th Street Suite 2500 Philadelphia, PA 19102 (215) 864-2800 John F. Innelli, Esquire Innelli and Molder 325 Chestnut Street, Suite 903 Philadelphia, PA 19106 215-627-3394**

I was the senior trial counsel for the defendant Bank and supervised a team from our firm, including Matthew Taylor, J. Manly Parks and Bruce Hanson and various paralegals.

Summary and Significance: This class action was one of very few cases involving claims emanating from a rarely analyzed federal statute, the Trust Indenture Act of 1940. The plaintiff class of purchasers and holders of certificates of deposit issued throughout the 1990's by equipment leasing companies that later became insolvent claimed that the

commercial bank which served as the trustee pursuant to the indentures governing the certificates negligently performed its fiduciary duties, causing the purchaser-investors to suffer losses when the issuers subsequently filed for bankruptcy. The challenge centered on the dearth of reported case law concerning either the Trust Indenture Act or the appropriate standard of conduct of an indenture trustee. The interplay of the statute, the diversity of particulars of the alleged losses among the thousands of class members, and the lengthy and problematic attempted salvation and then bankruptcy of the issuers challenged all counsel, as well as the court. This case drew considerable national attention in the commercial banking industry because so many such institutions have significant commercial trust departments but never envisioned the types of liabilities claimed by the plaintiff class in this case. Framing the technical issues required careful attention to the assembly of appropriate experts. Because of the lack of reported case law, the court and the magistrate judge frequently called upon counsel to frame, address and analyze issues as we worked through the case.

Disposition: We prevailed at the trial level by way of a combination of Rule 12(b)(6) motions and a successful summary judgment motion, all affirmed by the Third Circuit Court of Appeals.

2. M. DIANE KOKEN v. KPMG PEAT MARWICK, LLP, CARGILL, INCORPORATED, AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO, PRICE WATERHOUSE, LLP, AMERICAN NATIONAL BANK & TRUST COMPANY OF CHICAGO v. ALLEN W. STEWART and EPTON, MULLIN & DRUTH, LTD

Pennsylvania Commonwealth Court, No. 609 MD 1997

Representing:	**KPMG Peat Marwick**
Supervising Judge:	**Honorable Dan Pellegrini**
Trial Period:	**Case settled following extensive discovery and motion practice, Fall 2002.**
Opposing Counsel:	**Kean K. McDonald, Esquire** **Gerard E. Arth, Esquire** **Fox, Rothschild, O'Brien & Frankel LLP** **2000 Market Street** **10th Floor** **Philadelphia, PA 19103-3291** **215-299-2862** **215-299-2720**
Other Parties' Counsel:	Jeffrey G. Weil, Esquire Jan P. Levine, Esquire **Dechert Price & Rhoads** **4000 Bell Atlantic Tower** **1717 Arch Street** **Philadelphia, PA 19103-2793** **215-994-2538** **215-994-2440**

(co-counsel for PriceWaterhouseCoopers)

Frances P. Barron, Esquire
Julie A. North, Esquire
Cravath, Swaine & Moore
825 8th Avenue - Room 4050
New York, NY 55402
212-474-1506
(co-counsel for PriceWaterhouseCoopers)

Edward J. Pluimer, Esquire
Dorsey & Whitney, LLP
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
612-340-2973
(counsel for Cargill Corp.)

Alan J. Davis, Esquire
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
215-864-8230
(counsel for American National Bank)

I shared primary responsibility for the defense of KPMG in this case with one of my New York City litigation partners, Anthony J. Costantini. We were assisted by Rosemary Halligan of our New York office and various paralegals.

Summary and Significance: This civil case, brought by the Insurance Commissioner of Pennsylvania, arose from the insolvency and liquidation of Summit National Life Insurance Company ("SNLIC") and the federal criminal prosecution of lawyer and insurance executive Allen Stewart. The Insurance Department initiated this suit in the Commonwealth Court against our client, KPMG, and the successor auditor firm (Price Waterhouse) on the basis of audit reports relating to SNLIC in the late 1980's and early 1990's. The Department also sued the entity that sold SNLIC to Stewart. The case required that the Commonwealth Court exercise its infrequently used original trial jurisdiction, challenging all counsel as well as the Court to address jurisdictional and administrative issues (e.g., can the Commonwealth Court delegate its conduct of a jury trial to a common pleas court? familiarizing the Commonwealth Court with conventional discovery matters in the context of regulatory claims of executive privileges, etc.) In addition to the expected need to master complicated issues of statutory accounting rules applicable to insurance companies, analyzing inter-state regulatory discrepancies between Pennsylvania and Ohio, and juggling competing defense strategies among the defendants, this case presented many issues relating to the implications posed by the predicate federal criminal prosecution of Mr. Stewart, the

Insurance Department's supervision of the Summit liquidation, the operation of the Pennsylvania Insurance Guaranty Assn. and unsettled damages theories.

Disposition: After we secured a very favorable partial summary judgment, the case settled.

3. **J.J. WHITE, INC. v. WILLIAM A. GRAHAM CO., d/b/a THE GRAHAM COMPANY, WILLIAM A. GRAHAM, IV, and HARRY R. JOHNSON**

United States District Court for the Eastern District of Pennsylvania
Civil Action No. 96-6131

Represented:	**The Graham Company, William A. Graham, IV and Harry R. Johnson**
Trial Judge:	**The Honorable Robert S. Gawthrop, III**
Trial Period:	**9/14/98 - 9/16/98 (Jury Trial) (settled before verdict)**
Opposing Counsel:	**Steven A. Arbittier, Esq. and Robert McL. Boote, Esq. Ballard Spahr Andrews & Ingersoll, LLP 1735 Market Street, 51st Floor Philadelphia, PA 19103 (215) 864-8125 (215) 864-8231**

I was the trial counsel for all three defendants.

Summary and Significance: This RICO, fraud and breach of fiduciary duty case, brought by a long-time commercial insurance customer against a large commercial insurance broker, received industry-wide attention as the first litigated attempt to secure damages for the customary insurance industry practice by which brokers receive both service fees from customers and non-commission revenue from carriers but do not specifically disclose that revenue to the broker's client(s)/customer(s). Before this case, this practice had not received either regulatory or judicial attention. This particular case covered an 18-year period, almost 100 insurance policies, more than a dozen different carriers and allegedly many millions of dollars in premiums, service fees, commissions and other revenue. Handling it demanded both organizational, advocacy and public relations skills.

Disposition: After three years of active litigation, including one interlocutory appeal to the Third Circuit Court of Appeals on a novel issue involving the interplay of the McCarran-Ferguson Act and RICO, the case (which was expected to be tried for three weeks) was resolved after opening arguments, with two of the three counts being dismissed and the third count being resolved pursuant to a confidential agreement.

4. **DONALD NIKOLAUS v. INSURANCE DEPARTMENT OF THE COMMONWEALTH OF PENNSYLVANIA, LINDA S. KAISER, INSURANCE COMMISSIONER, OLD GUARD MUTUAL INSURANCE COMPANY, OLD GUARD MUTUAL FIRE INSURANCE COMPANY, GOSCHENHOPPEN-HOME MUTUAL INSURANCE COMPANY and OLD GUARD GROUP, INC.**

Commonwealth Court of Pennsylvania, Docket No. 25 MD 1997

Represented:	**Donald Nikolaus**
Trial Judge:	**Commonwealth Court Judge James R. Kelley**
Trial Period:	**January 1997**
Opposing Counsel:	**Terrance A. Keating, Esquire** **Insurance Department of the Commonwealth of Pennsylvania** **1341 Strawberry Square** **Harrisburg, PA 17120** **(717) 783-2125** **(counsel for Insurance Department)** **G. Thompson Bell, Esquire** **Stevens & Lee** **111 North Sixth Street** **P.O. Box 679** **Reading, PA 19603-0679** **(610) 478-2000** **(co-counsel for Old Guard Mutual Cos.)** **Richard P. McElroy, Esquire** **Blank Rome Comisky & McCauley** **1200 Four Penn Center** **Philadelphia, PA 19103** **(215) 569-5631** **(co-consel for Old Guard Mutual Cos.)**

I was the sole trial counsel for the plaintiff/petitioner.

Summary and Significance: This case represented the first in-court challenge to Pennsylvania's new, "streamlined" mutual insurance company conversion procedure, a scheme that has been followed in several other states. The statute omitted any notice or hearing requirement for policyholders who questioned or did not desire the conversion. Our client challenged the statute on that basis. Our client was opposed not only by the Insurance Department but also by the four companies whose management desired conversion. The litigation was widely reported in the financial and industry press, although our client eschewed publicity in favor of improving the openness of the conversion approval process. The result of the litigation was the adoption by the Insurance Department of certain due process procedures requested by our client to supplement the new statute.

Disposition: My client challenged the constitutionality of Pennsylvania's then-new mutual-to-stock conversion statute relating to insurance companies. The client retained me to petition to enjoin a policyholders' proxy vote to authorize the conversion. Although Judge Kelley refused to issue the injunction, the Court did allow the constitutional challenges to proceed against the Insurance Department for a full trial. As a result, the Department agreed to modify its procedures under the statute to meet

our client's constitutional concerns prior to completion of the trial, so the matter was settled.

5. **THE GRAHAM COMPANY and WILLIAM A. GRAHAM IV v. ROLLINS, BURDICK, HUNTER COMPANY, AON CORPORATION and JOSEPH M. McNASBY**

United States District Court for the Eastern District of Pennsylvania, Civil Action No. 92-1851

Represented:	**The Graham Company and William A. Graham, IV**
Trial Judge:	**The Honorable Jan DuBois - Jury Trial**
Trial Period:	**6/16/93 - 6/22/93**
Opposing counsel:	**Michael L. Banks, Esquire Morgan, Lewis & Bockius 2000 One Logan Square Philadelphia, PA 19103-6993 (215) 963-5387**

I was the trial counsel for the plaintiffs, assisted by a then-junior associate in my firm, Gerald J. Pappert.

Summary and Significance: This dispute concerned primarily the enforcement of a very comprehensive covenant-not-to-compete in the context of the highly competitive insurance brokerage business. My client also sought damages and injunctive relief in connection with certain actions of the ex-employee's subsequent employers. The case also involved serious counterclaims (including libel and slander claims), a consolidated related state court action and multi-jurisdictional discovery disputes around the country.

The significance of the case was that a great volume of my client's most profitable business was at risk. The damages issues were somewhat novel in terms of the valuation of the business at issue.

Disposition: Settled after presentation of opponent's case to the jury. Under the terms of the settlement, I can only report that my clients were very pleased with the result which upheld the covenant not compete we sought to enforce.

6. **RICHARD HAEFNER v. RICHARD A. SPRAGUE, EDWARD H. RUBENSTONE, SPRAGUE AND RUBENSTONE, JACK L. GRUENSTEIN, MICHAEL MINKIN, and JULIE T. BARSEL**

Court of Common Pleas, Philadelphia County, April Term 1984
Civil Action No. 2914

Represented:	**Richard Sprague and three of his former partners**
Trial Judge:	**The Honorable Louis G. Hill – Jury Trial**
Trial Period:	**10/24/88 – 11/9/88**
Opposing Counsel:	**Kenneth William Richmond, Esquire Rosengarten, Richmond & Hevenor P.C., 1700 Walnut Street, Suite 500, Philadelphia, PA 19103, (215) 732-4993,**

and
Anthony P. Ambrosio, Esquire
317 Belleville Avenue,
Bloomfield, NJ 07003, (201) 748-7474.

Reported at: 20 Phila. 157 (1989); 411 Pa. Super. 672, 593 A.2d 917 (Pa. Super. 1990);
Same Case: 344 Pa. Super. 631, 495 A.2d 618 (1985); 343 Pa. Super. 342, 494 A.2d 1115 (1985).

I was sole defense counsel for all defendants.

Summary and Significance: This was the first lawyer negligence case I ever handled alone from start to finish. Hence, I include it in this list of "most significant matters." I credit this case with prompting my long-time interest in matters relating to professional standards and professional liability. My clients had represented the plaintiff in connection with highly inflammatory criminal charges and then again in a federal civil rights action against law enforcement officials. The plaintiff was dissatisfied with the results, and sued his lawyers.

Like all attorney malpractice cases, this one required mastery of the "case within a case". Thus, we dealt with three types of highly inflammatory criminal charges, alleged policy brutality, federal constitutional law issues and the interplay of federal and state causes of action and principles of comity. There were also practical and ethical issues involving simultaneous representation of multiple defendants. We secured a number of important, reported legal rulings relevant to matters involving proof of causation in professional negligence cases.

The litigation started in the early 1980's and lasted seven years. During some of that time, plaintiff proceeded pro se, providing my first experience with the special challenges for the court and counsel of dealing with a bright, single-minded, but unschooled litigant-advocate. The practical significance of the case was the unique situation of my serving (at a time relatively early in my career) as sole defense counsel for one of the region's most well-known, experienced and creative trial attorneys.

The case also had significance in terms of handling expert witnesses and appreciation of the art cross-examination of experts.

Disposition: Entry of directed verdict at conclusion of plaintiff's case; verdict upheld by Pennsylvania Superior Court; allocatur denied by Pennsylvania Supreme Court, all in favor of my clients.

7. M. DIANE KOKEN, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA v. FIDELITY MUTUAL LIFE INSURANCE COMPANY (DEAKINS, et al v. KOKEN)

In the Commonwealth Court of Pennsylvania, No. 389 M.D. 1992
Represented: Warren W. Deakins
Trial Judge: None assigned. Court appointed Hearing Master, Edward J. Finkelstein

Trial Period: January 19, 2001, January 22, 2001 and October 23, 2001
Opposing Counsel: E. Parry Warner, Esquire
Obermayer, Regmann Maxwell & Hippel
One Penn Center, 19th Floor, 1617 John F. Kennedy Blvd.
Philadelphia, PA 19103 (215) 665-3226

Other Parties' Counsel: Gary R. Leadbetter, Esquire
Law Offices of Gary Leadbetter
11 East Airy Street
Norristown, PA 19404, (610) 270-0707
(counsel for Uldis Bucus and Lawrence Fullerton)

I was Mr. Deakins' sole trial counsel.

Summary and Significance: Because the aggregate of the claims represented a large sum of money crucial to my client's retirement, the case was certainly significant to him. As a legal matter, the case as summarized below presented a significant challenge because the special legislation and regulatory scheme applicable to insurance companies in rehabilitation modify conventional corporate and employment law to the arguable disadvantage of creditors/employees. In this regard, the law relating to rehabilitation and liquidation is similar in many respects to bankruptcy law.

Disposition: My client was the former Chief Executive Officer and director of a life insurance company that entered financial rehabilitation supervised by the Pennsylvania Insurance Department. The client challenged his termination and denial of bonus, retirement, salary and other fringe benefit payments. Under statutory procedures applicable to insurance company rehabilitations, the claims were assigned to a special hearing master who conducted evidentiary hearings and received briefing and oral arguments over a lengthy period. Ultimately, the master's favorable recommendations on my client's remaining claims were upheld by the supervising judge without further proceedings.

8. CHESTNUT HILL ACADEMY, et al v. ANDREW ROSENAU, et al

In the Superior Court of Pennsylvania, Docket Number 3609 EDA 2002
Represented: Amici Curiae National Association of Independent Schools and Pennsylvania Association of Independent Schools
Trial Judge: Three-judge appellate panel
Appellate Period: 11/19/02-05/03
Opposing Counsel: Allan J. Sagot, Esquire
Allan J. Sagot & Associates
One Liberty Place
1650 Market Street
Philadelphia, PA 19103-7301
(215) 557-0240.
(counsel for Rosenau)

Other Parties' Counsel: **John B. Langel, Esquire**
Ballard Spahr Andrews & Ingersoll, LLP
1735 Market Street
Philadelphia, PA 19103-7599
(215) 864-8227
(counsel for Chestnut Hill Academy)

I was the counsel for amici, assisted by one of my associates at the firm, Lauren deBruicker.

Summary and Significance: An independent secondary school disciplined a senior who had surreptitiously filmed a classmate and a young woman engaged in intimate conduct. When the school expelled the student, the student and his parents sought to enjoin the expulsion on grounds that the school's customary disciplinary procedures had not been followed precisely and that the punishment was too severe. After the trial court enjoined the expulsion (but upheld the school's right to preclude the student from attending classes on campus), I was retained by two associations representing independent schools in Pennsylvania and throughout the country that sought to appear as *amici curiae* in the appellate proceedings because of the potential significance of an appellate decision on the issues of judicial review and autonomy of the internal disciplinary procedures of non-public schools. The Superior Court permitted the *amicus* appearance, received our briefs and invited my full participation in the oral argument. Inasmuch as by the time the court was prepared to issue its ruling, the student had completed his senior year with home-study and was permitted to matriculate at college without a diploma from the school, the appellate court ruled that the controversy was moot, leaving the state of appellate case law in this jurisdiction in tact, the practical result preferred by the *amici* I represented.

Disposition: After appellate briefing and oral argument, the Superior Court ruled that the matter was moot. None of the parties appealed.

9. **ANDREW SIMON v. MELBA PEARLSTEIN, CONFAB, INC., THE WAVERLY GROUP, LLC, JAMES M. PAPADA, III, ESQUIRE, STRADLEY, RONON STEVENS & YOUNG, LLP, JOHN PEARLSTEIN, HAYLEY FINK, ABBIE DEAN, LORRIE PETERS LUNN, FRANK E. WEISE, III, DUNBAR, CORP. AND LENARK, LLC.**

In the Court of Common Pleas, Philadelphia County, July Term 1999
Civil Action No. 1156
Represented: **Melba Pearlstein, John Pearlstein, Abbie Dean, Haley Fink, Lorrie Peters Lunn, Confab Corp., The Waverly Group, Dunbar Corp., Lenmark LLC**
Supervising Trial Judge: **Honorable Alan Sheppard**
Trial Period: **Settled before trial.**
Opposing Counsel: **Richard A. Sprague, Esquire**

Charles Hardy, Esquire
Sprague & Sprague
Suite 400, The Wellington Building
135 South 19th Street
Philadelphia, PA 19103-4909
(215) 561-7681

Other Parties' Counsel:

Dennis R. Suplee, Esquire
Schnader Harrison Segal & Lewis LLP
Suite 3600, 1600 Market Street
Philadelphia, PA 19103-7286
(215) 751-2068
(counsel for Stradley, Ronon, Stevens & Young LLP and J. M. Papada)

Marc Sonnenfeld, Esquire
Morgan, Lewis & Bockius, LLP
1701 Market Street
Philadelphia, PA 19103
(215) 963-5572
(counsel for F. Weise)

I was the senior trial counsel for our clients, assisted by my then-partner Elise Singer and my associate, Kelly Eckel.

Summary and Significance: This litigation presented a proto-typical dispute involving a very profitable family conglomerate in which a daughter's ex-husband had enjoyed the patriarch/CEO's favor even after the domestic difficulties but when the patriarch died, the ex-son-in-law demanded familial-favored status when the widow and her children decided to sell the businesses over the plaintiff's objections. After unsuccessfully trying to block the sales, plaintiff filed civil claims against the family shareholders (my clients), the primary non-family executive and the family's corporate legal counsel. Plaintiff's claims included equitable and legal claims, including claims that the patriarch had induced plaintiff to remain with the family businesses by promising plaintiff a share of the patriarch's estate commensurate with the bequests to the direct off-spring, claims of wrongful termination, minority shareholder claims and a number of other theories. As a result of aggressive investigatory and discovery efforts, plaintiff and his regionally renowned counsel were eventually persuaded to abandon his claims leaving the family free to pursue their intended business plans.

Disposition: Following my taking the deposition of the plaintiff, plaintiff agreed to withdraw his suit in toto in return for mutual releases and my clients agreeing to re-propose their pre-litigation offer to acquire his minority partnership interest in one of their family enterprises.

10. **POTTSTOWN SCHOOL DISTRICT v. THE HILL SCHOOL and MONTGOMERY COUNTY BOARD OF ASSESSMENT APPEALS**

Commonwealth Court of Pennsylvania, No. 1501 C.D. 2000

Represented:	**Amici Curiae, Pennsylvania Association of Independent Schools, The National Association of Independent Schools, Association of Colorado Independent Schools, The Association of Independent Maryland Schools, Association of New England Independent Schools, California Association of Independent Schools, the Hawaii Association of Independent Schools, and Advancement for Delaware Valley Independent Schools**
Trial Judge:	**Honorable Richard S. Lowe**
Appellate Panel:	**Commonwealth Court en banc: June, 2000**
Opposing Counsel:	**Joseph E. Bresnan, Esquire 217 East Butler Avenue Ambler, PA 19002 (No current telephone number listed)**
Other Parties' Counsel:	**Thomas D. Rees, Esquire High, Swartz, Roberts & Seidel LLP 40 East Airy Street Norristown, PA 19404 (610) 275-0700 (counsel for The Hill School)**

I was the counsel for all *amici*, assisted by my associate, Lauren deBruicker.

Summary, Significance and Disposition: Plaintiff challenged the real estate tax exemption granted to a single-sex independent school. After the trial court held that a non-coed school could not be a "purely public charity" under Pennsylvania law, a consortium of associations of independent schools and colleges retained me to represent them as *amici curiae* in the appellate process in which the plaintiff challenged the constitutionality of the Commonwealth's Purely Public Charity Act, arguing that non-coed private schools are impermissibly discriminatory. The Court granted *amici* status to our clients, and following briefing and oral argument, reversed the trial court, upheld the constitutionality of the statute and preserved the tax exemption for Pennsylvania's single-sex independent schools and colleges.

Among the associations I represented were 271 single-gender schools. Within Pennsylvania alone, more than 12,200 students attend all-boys or all-girls schools. These institutions employ hundreds of teachers, administrators and support staff. Loss of the tax exemption threatened their future financial viability. More importantly, these schools feared being summarily characterized as "discriminatory." The results obtained in this case permitted the schools to pursue their educational missions.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that

did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Response:

One of the clients for which I have provided various non-litigation services over many years is the Philadelphia Zoo, including most significantly:

- **Investigation and resolution of all legal and insurance issues relating to the Zoo's Primates exhibit Christmas Eve 1999 fire that completely destroyed the exhibit, killing the Zoo's entire primate collection. After negotiating a settlement of a multi-layer insurance claim I also coordinated the legal services relating to the contractual issues for the design, construction and operation of the new World of Primates exhibit which was built on the site in 2001.**

- **Handling contract dispute between the Zoo and its monorail operator following a series of monorail fires and accidents, including issues relating to interference of the operation of the monorail with the Zoo's special animal husbandry concerns relating to the Zoo's efforts to breed the federally-protected bald eagles located near the ride.**

- **Handling various legal issues relating to contracts with animal brokers handling exotic and/or endangered species crossing international borders.**

Many of my services for outside clients have concerned confidential professional liability and/or professional ethics matters attendant to events such as professional services firm break-ups, confidential disciplinary complaints to licensing boards, conflicts of interest ethics analysis, and the like. I cannot disclose these clients, but a representative sample of such engagements follows:

1. Mid-western, medium-sized law firm was concerned that one of its partners had engaged in dishonest billing practices over the course of several years. I was retained to conduct internal investigation, evaluate firm's obligation to report the partner to the governing disciplinary authority, supervise financial audit, negotiate partner's termination, guide the firm's rectification of client billing, and provide advice to the firm for instituting operational safeguards.

2. Three partners in large multi-national law firm elected to withdraw from their firm without notice. The partners retained me to provide them with advice concerning ethical issues relating to solicitation of clients, associates and support staff in three different jurisdictions (U.K., New York and Washington, D.C.), removal of information technology and other property, and to negotiate their financial separation of the firm. In the last several years I have handled four similar matters involving lawyers in other law firms and three similar situations for partners in large accounting firms.

3. A large international accounting firm retained me to handle a private ethics investigation against the firm by the AICPA and the Pennsylvania State Board of Accountancy concerning the allegedly substandard audit of a municipal agency performed by a local office of the firm. My task was to defend and extricate the accounting firm from the confidential proceedings so that the firm's qualification to submit bids for public-entity engagements would not be jeopardized, a goal that was ultimately achieved.

4. Ethics complaint against three lawyers to Maine disciplinary board accusing the lawyers of impermissible conflicts of interest and breaches of ethics duties of loyalty and confidentiality. I was retained to handle the matter which was eventually dismissed without any adverse finding and without settlement.

5. Engagement by attorney who is the subject of confidential federal regulatory agency for anti-competitive/antitrust violations and "aider and abettor" liability arising from lawyer's advice and consultation with consortium of clients in a single industry seeking to improve their bargaining position vis à vis others in the industry. My task is to persuade the regulator to close the investigation of the lawyer.

6. Engagements by several law firms and sole practitioners in various states for advice on how to adhere to applicable ethics rules while organizing and operating ancillary businesses, such as lobbying firms, investment advisers, tax preparation services, sports and entertainment agency activities, crisis management and public relations firms.

7. Engagements by sole practitioners or small law firms and accounting firms to prepare ethics-compliant forms and procedures such as engagement letters, fee structures, conflicts of interest identification and resolution processes, liability insurance, document retention policies and procedures, etc.

8. Engagements by several in-house corporate law departments to design internal ethics procedures and "Sarbanes-Oxley" compliance procedures.

9. Engagements by two large law firms to assist those firms in developing more "female-friendly" professional environments in order to stem the departures of women lawyers from those firms.

10. Legal advice to four educational institutions (private schools, charter schools and colleges) relating to student disciplinary policies and procedures, removal of teachers and/or administrators for misconduct, fund-raising initiatives, and tax exemption issues.

II. Financial Data And Conflict of Interest (Public)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   Response: Upon resignation from Duane Morris LLP, I expect to receive a lump-sum return of my capital account and payment of profits of the firm per my percentage interest as well as release of my pension and retirement accounts, as permitted. I have no other financial expectations or arrangements.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   Response: In the event I am confirmed, I will maintain in my chambers a screening mechanism to identify potential conflicts of interest consistent with 28 U.S.C. § 455 and the Code of Judicial Conduct. I will recuse myself from cases in which Duane Morris LLP (the law firm with which I have been affiliated since graduating from law school) represents any party, from any case in which my husband's employer (currently, PMA Capital Corp.) is a party, from any case in which any member of my family is a party or witness and from any case in which my daughter (a lawyer) is counsel for a party.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   Response: I have no such plans, commitments or agreements.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   Response: Please see Financial Disclosure Report.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

   Response: Please see Financial Net Worth Statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   Response: No, other than to host or attend various fund-raising social events for various national, state or local candidates.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year 2002

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Pratter, Gene E	U.S. District Court, E.D. Pa.	11/3/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time)	**5. ReportType** (check appropriate type)	**6. Reporting Period**
U.S. District Judge - Nominee	(•) Nomination, Date 11/3/2003 ( ) Initial ( ) Annual ( ) Final	1/1/2002 to 10/3/2003
7. Chambers or Office Address	**8.** On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
Duane Morris LLP One Liberty Place Philadelphia, PA 19103	Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Co-Trustee	Trust #1
2.	Partner & General Counsel	Duane Morris LLP

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	Est 2004	Post-resignation return of capital, distribution of profits earned during term of partnership. Parties: Duane Morris LLP & Gene E.K. Pratter (Lump Sum)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2003	Duane Morris LLP (Spouse - Post Retirement Distribution)	
2.	2002	Duane Morris LLP (Spouse - Post Retirement Distribution)	
3.	2003	PMA Capital Corp (Spouse - SR. VP & General Counsel)	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Pratter, Gene E	11/3/2003

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ **NONE** - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
4.	2002	PMA Capital Corp (Spouse - Sr. VP & General Counsel)	
5.	2003	Duane Morris LLP (Partner)	232,661
6.	2002	Duane Morris LLP (Partner)	460,369

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Pratter, Gene E	11/3/2003

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ **NONE** - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ **NONE** - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ **NONE** - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Bank of America	Credit Card	K

FINANCIAL DISCLOSURE REPORT
Page 1 of 11

Name of Person Reporting	Date of Report
Pratter, Gene E	11/3/2003

VII. INVESTMENTS and TRUSTS – income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	D. (3) Value Code 2 (J-P)	D. (4) Gain Code 1 (A-H)	D. (5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. Prusky Portflio - Retirement #1	E	Dividend	M	T	Exempt				
2. First Eagle Overseas - Retirement #1	B	Dividend	M	T	Exempt				
3. Brandywine - Retirement #1		None	N	T	Exempt				
4. Sound Shore - Retirement #1	A	Dividend	N	T	Exempt				
5. Schwab Inst Trust - Retirement #1		None	N	T	Exempt				
6. StoneRidge Small Cap - Retirement #1		None	M	T	Exempt				
7. Vanguard Growth Equity - Retirement #1		None	M	T	Exempt				
8. Schwab S & P 500 - Retirement #1	A	Dividend	K	T	Exempt				
9. BlackRock Core Bond - Retirement #1	D	Dividend	L	T	Exempt				
10. BlackRock Low Duration Bond - Retirement #1	C	Dividend	L	T	Exempt				
11. Scwhab Value Advantage - Retirement #1	A	Dividend	J	T	Exempt				
12. Bear Stearns International - Retirement #1		None	L	T	Exempt				
13. Marvin & Palmer Global - Retirement #1	E	Dividend			Exempt				
14. Vanguard Total Bond Market Index - Retirement #2	B	Dividend	K	T	Exempt				
15. Vanguard Index 500 - Retirement #2	A	Dividend	K	T	Exempt				
16. Vanguard International Growth - Retirement #2	A	Dividend	J	T	Exempt				
17. Vanguard Windsor II - Retirement #2	A	Dividend			Exempt				
18. PMA Common Stock - Retirement #2	A	Dividend	K	T	Exempt				

1. Income/Gain Codes: (See Columns B1 and D4) A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: (See Columns C1 and D3) J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes (See Column C2) Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market; U = Book Value; V = Other; W = Estimated

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Pratter, Gene E	11/3/2003

VII. INVESTMENTS and TRUSTS – income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
19. Vanguard Total Bond Market Index - Retirement #3	B	Dividend	K	T	Exempt				
20. Vanguard Index 500 - Retirement #3	A	Dividend	K	T	Exempt				
21. Vanguard Windsor II - Retirement #3	A	Dividend	K	T	Exempt				
22. Vanguard International Growth - Retirement #3	A	Dividend	J	T	Exempt				
23. Vanguard Short Term Bond - Retirement #4	B	Dividend	K	T	Exempt				
24. Vanguard Windsor II - Retirement #4	A	Dividend	J	T	Exempt				
25. Vanguard US Growth - Retirement #4	A	Dividend	J	T	Exempt				
26. Vanguard Explorer - Retirement #4	A	Dividend	J	T	Exempt				
27. Vanguard Strategic Equity - Retirement #4	A	Dividend	K	T	Exempt				
28. Vanguard International Growth - Retirement #4	A	Dividend	J	T	Exempt				
29. Deutsche International Equity - Retirement #5		None			Exempt				
30. DFA US Small Cap Value - Retirement #5	A	Dividend	J	T	Exempt				
31. DFA US Large Cap Value - Retirement #5	A	Dividend	J	T	Exempt				
32. Federated US Gov't 1 - 3 - Retirement #5	A	Dividend	K	T	Exempt				
33. First Eagle Overseas - Retirement #5	A	Dividend	J	T	Exempt				
34. Janus Fund - Retirement #5		None	J	T	Exempt				
35. Janus Adviser Growth - Retirement #5		None			Exempt				
36. Janus Adviser International - Retirement #5	A	Dividend	J	T	Exempt				

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000
	E = $15,001-$50,000	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000
	H2 = More than $5,000,000			
2. Value Codes - (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000	
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market
	U = Book Value	V = Other	W = Estimated	

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
37. MFS Emerging Growth - Retirement #5		None			Exempt				
38. NB Fasciano - Retirement #5		None	J	T	Exempt				
39. Schwab Money Market - Retirement #5	A	Interest	J	T	Exempt				
40. Sound Shore - Retirement #5	A	Dividend	J	T	Exempt				
41. Westcore MIDCO Growth - Retirement #5		None	J	T	Exempt				
42. Federated US Gov't 1 - 3 - Retirement #6	A	Dividend	J	T	Exempt				
43. Janus Adviser International - Retirement #6	A	Dividend	J	T	Exempt				
44. MFS Mass Investors Trust - Retirement #6	A	Dividend	J	T	Exempt				
45. PMA Common Stock - Retirement #6	B	Dividend	K	T	Exempt				
46. Royce Opportunity - Retirement #6	A	Dividend	J	T	Exempt				
47. Schwab Money Market - Retirement #6	A	Interest	J	T	Exempt				
48. Thornburg Value - Retirement #6	A	Dividend	J	T	Exempt				
49. StoneRidge Small Cap Equity - Retirement #7		None	L	T	Exempt				
50. Deutsche International Equity - Retirement #7		None			Exempt				
51. Baron Growth - Retirement #7		None	L	T	Exempt				
52. Bear Stearns International - Retirement #7		None	L	T	Exempt				
53. Brandywine - Retirement #7		None	L	T	Exempt				
54. Columbia Growth - Retirement #7		None	L	T	Exempt				

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes: (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

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Name of Person Reporting	Date of Report
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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
55. DFA US Micro Cap - Retirement #7	A	Dividend	K	T	Exempt				
56. DFA One Year Fixed - Retirement #7	D	Dividend	N	T	Exempt				
57. DFA US Small Cap Value - Retirement #7		None	J	T	Exempt				
58. DFA US Large Value - Retirement #7	C	Dividend	M	T	Exempt				
59. Dodge & Cox Stock - Retirement #7	D	Dividend	M	T	Exempt				
60. Federated US Gov't 1 - 3 - Retirement #7	D	Dividend	M	T	Exempt				
61. First Eagle Overseas - Retirement #7	B	Dividend	L	T	Exempt				
62. Hotchkis & Wiley Mid Cap Value - Retirement #7		None	L	T	Exempt				
63. Julius Baer International - Retirement #7	A	Dividend	K	T	Exempt				
64. MFS Emerging Growth - Retirement #7		None			Exempt				
65. Montgomery Emerging Markets - Retirement #7		None			Exempt				
66. Morgan Stanley International - Retirement #7	A	Dividend	L	T	Exempt				
67. Morgan Stanley Emerging Markets - Retirement #7		None	K	T	Exempt				
68. Royce Opportunity - Retirement #7	B	Dividend	M	T	Exempt				
69. Schwab Money Market - Retirement #7	A	Interest	J	T	Exempt				
70. Sound Shore - Retirement #7	E	Dividend			Exempt				
71. Vanguard Growth Equity - Retirement #7	A	Dividend	L	T	Exempt				
72. Westcore International Frontier - Retirement #7		None	K	T	Exempt				

1. Income/Gain Codes: A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000
(See Columns B1 and D4) F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000
(See Columns C1 and D3) N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000
P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes: Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market
(See Column C2) U = Book Value; V = Other; W = Estimated

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Name of Person Reporting	Date of Report
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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
73. Westcore Mid Cap Opportunity - Retirement #7	A	Dividend	L	T	Exempt				
74. Westcore Growth - Retirement #7		None	L	T	Exempt				
75. Westcore MIDCO Growth - Retirement #7		None	L	T	Exempt				
76. Schwab Money Market - Trust #1	A	Interest	K	T	Exempt				
77. Schwab Municipal Money Market - Trust #1	A	Interest	N	T	Exempt				
78. Scudder Short Term Muni - Trust #1	A	Dividend	L	T	Exempt				
79. SBC Communications Common Stock - Trust #1	A	Dividend	K	T	Exempt				
80. Agere Systems Common A - Custodial #1		None			Exempt				
81. Agere Systems Common B - Custodial #1		None			Exempt				
82. Avaya Common - Custodial #1		None			Exempt				
83. Cisco Systems Common - Custodial #1		None			Exempt				
84. Comcast Corp Common - Custodial #1		None			Exempt				
85. DFA One Year Fixed - Custodial #1	A	Dividend	K	T	Exempt				
86. RR Donnelly & Sons Common - Custodial #1	A	Dividend			Exempt				
87. Dodge & Cox Stock - Custodial #1	A	Dividend	K	T	Exempt				
88. Federated US Gov't 1 - 3 - Custodial #1	A	Dividend	K	T	Exempt				
89. First Eagle Overseas - Custodial #1		None	J	T	Exempt				
90. Janus Fund - Custodial #1		None	J	T	Exempt				

1. Income/Gain Codes: A = $1,000 or less, B = $1,001-$2,500, C = $2,501-$5,000, D = $5,001-$15,000, E = $15,001-$50,000
(See Columns B1 and D4) F = $50,001-$100,000, G = $100,001-$1,000,000, H1 = $1,000,001-$5,000,000, H2 = More than $5,000,000
2. Value Codes: J = $15,000 or less, K = $15,001-$50,000, L = $50,001-$100,000, M = $100,001-$250,000
(See Columns C1 and D3) N = $250,000-$500,000, O = $500,001-$1,000,000, P1 = $1,000,001-$5,000,000, P2 = $5,000,001-$25,000,000
P3 = $25,000,001-$50,000,000, P4 = $More than $50,000,000
3. Value Method Codes: Q = Appraisal, R = Cost (Real Estate Only), S = Assessment, T = Cash/Market
(See Column C2) U = Book Value, V = Other, W = Estimated

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Name of Person Reporting	Date of Report
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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
91. Janus Adviser Growth - Custodial #1		None			Exempt				
92. Johnson & Johnson Common - Custodial #1	A	Dividend	J	T	Exempt				
93. Julius Baer International - Custodial #1		None	J	T	Exempt				
94. LSI Logic Common - Custodial #1		None			Exempt				
95. Lucent Technologies Common - Custodial #1		None			Exempt				
96. MBNA Common - Custodial #1	A	Dividend			Exempt				
97. Morgan Stanley International - Custodial #1		None	J	T	Exempt				
98. NB Fasciano - Custodial #1		None	J	T	Exempt				
99. PMA Common - Custodial #1	B	Dividend	K	T	Exempt				
100. Royal Dutch Common - Custodial #1	A	Dividend			Exempt				
101. Royce Opportunity - Custodial #1		Royalty	J	T	Exempt				
102. Schwab Money Market - Custodial #1	A	Interest	J	T	Exempt				
103. Westcore Mid Cap Opp - Custodial #1		None	J	T	Exempt				
104. Westcore MIDCO Growth - Custodial #1		None	J	T	Exempt				
105. Vanguard Windsor II - Custodial #1	B	Dividend			Exempt				
106. Vanguard Small Cap - Custodial #1	A	Dividend			Exempt				
107. AT&T Common - Brokerage #1	A	Dividend	J	T	Exempt				
108. Avaya Common - Brokerage #1		None			Exempt				

1. Income/Gain Codes: (See Columns B1 and D4) A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: (See Columns C1 and D3) J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes: (See Column C2) Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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Name of Person Reporting	Date of Report
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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
109. Duetsche International - Brokerage #1		None			Exempt				
110. Baron Growth - Brokerage #1		None	K	T	Exempt				
111. DFA Tax Mgd Marketwide Value - Brokerage #1	A	Dividend	K	T	Exempt				
112. DFA Tax Mgd US Small Cap Value - Brokerage #1	A	Dividend	K	T	Exempt				
113. Dreyfus Short Term Muni - Brokerage #1	B	Dividend			Exempt				
114. Federated Short Term Muni - Brokerage #1	A	Dividend	K	T	Exempt				
115. First Eagle Overesea - Brokerage #1	A	Dividend	J	T	Exempt				
116. IBM Common - Brokerage #1	A	Dividend			Exempt				
117. Janus Fund - Brokerage #1		None	K	T	Exempt				
118. Janus Adviser Growth - Brokerage #1		None			Exempt				
119. Janus Adviser International - Brokerage #1	A	Dividend	J	T	Exempt				
120. Lucent Technologies Common - Brokerage #1		None	J	T	Exempt				
121. MFS Emerging Growth - Brokerage #1		None			Exempt				
122. Morgan Stanley International - Brokerage #1	A	Dividend	J	T	Exempt				
123. PMA Common Stock - Brokerage #1	C	Dividend	M	T	Exempt				
124. Schwab Money Market - Brokerage #1	A	Interest	K	T	Exempt				
125. Scudder Short Term Muni - Brokerage #1	D	Dividend	M	T	Exempt				
126. Sound Shore - Brokerage #1	A	Dividend	K	T	Exempt				

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	I = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

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127. UPS Common - Brokerage #1	A	Dividend			Exempt				
128. Westcore MIDCO Growth - Brokerage #1		None	K	T	Exempt				
129. Agilent Technologies Common - Brokerage #2		None			Exempt				
130. Baron Growth - Brokerage #2		None	J	T	Exempt				
131. ChevronTexaco Common - Brokerage #2		None			Exempt				
132. Clorox Common - Brokerage #2		None			Exempt				
133. Columbia Growth - Brokerage #2		None			Exempt				
134. Commerce Bancorp Common - Brokerage #2		None			Exempt				
135. DFA US Micro Cap - Brokerage #2		None	J	T	Exempt				
136. DFA Tax Mgd Marketwide Value - Brokerage #2	A	Dividend	K	T	Exempt				
137. DFA Tax Mgd US Small Cap Value - Brokerage #2		None	J	T	Exempt				
138. Dodge & Cox Stock - Brokerage #2	A	Dividend	K	T	Exempt				
139. Dover Corp Common - Brokerage #2		None			Exempt				
140. ExxonMobil Common - Brokerage #2	A	Dividend	J	T	Exempt				
141. Federated Short Term Muni - Brokerage #2	A	Dividend	K	T	Exempt				
142. Federated US Gov't 1 - 3 - Brokerage #2	A	Dividend			Exempt				
143. FAM Value - Brokerage #2		None			Exempt				
144. First Eagle Overseas - Brokerage #2		None	J	T	Exempt				

1. Income/Gain Codes: A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000
(See Columns B1 and D4) F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: I = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000
(See Columns C1 and D3) N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000
P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes: Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market
(See Column C2) U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
145. First Eagle Global - Brokerage #2		None	J	T	Exempt				
146. Forrester Research Comon - Brokerage #2		None			Exempt				
147. General Electric Common - Brokerage #2	A	Dividend	J	T	Exempt				
148. HSBC Holdings Common - Brokerage #2		None			Exempt				
149. Hewlett Packard Common - Brokerage #2	A	Dividend			Exempt				
150. Hotchkis & Wiley Mid Cap Value - Brokerage #2		None	K	T	Exempt				
151. Intel Common - Brokerage #2		None			Exempt				
152. JP Morgan Common - Brokerage #2		None			Exempt				
153. Janus Fund - Brokerage #2		None	J	T	Exempt				
154. Janus Adviser Growth - Brokerage #2		None			Exempt				
155. Janus Adviser International - Brokerage #2		None	J	T	Exempt				
156. Johnson & Johnson Common - Brokerage #2	A	Dividend	K	T	Exempt				
157. Julius Baer International - Brokerage #2		None	J	T	Exempt				
158. Kimberly Clark Common - Brokerage #2	A	Dividend	J	T	Exempt				
159. Merck Common - Brokerage #2		None			Exempt				
160. Marsh & McLennan Common - Brokerage #2		None			Exempt				
161. Morgan Stanley International - Brokerage #2		None	J	T	Exempt				
162. NB Fasciano - Brokerage #2		None	J	T	Exempt				

1. Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Pratter, Gene E	11/3/2003

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
163. Onandango Couty, NY Bond - Brokerage #2		None	K	T	Exempt				
164. Royce Opportunity - Brokerage #2		None	K	T	Exempt				
165. Schlumberger Common - Brokerage #2		None			Exempt				
166. Schwab Money Market - Brokerage #2	A	Interest	K	T	Exempt				
167. Scudder Short Term Muni - Brokerage #2	A	Dividend	L	S	Exempt				
168. Sound Shore - Brokerage #2	A	Dividend			Exempt				
169. SBC Communications Common - Brokerage #2	A	Dividend	J	T	Exempt				
170. Teleflex Common - Brokerage #2		None			Exempt				
171. Thornburg Value - Brokerage #2	A	Dividend			Exempt				
172. Tyco International Common - Brokerage #2		None			Exempt				
173. US Treasury Note 8/15/05 - Brokerage #2	A	Dividend	K	T	Exempt				
174. US Treasury Note 10/15/06 - Brokerage #2		None	K	T	Exempt				
175. Van Kampen Comstock - Brokerage #2		None			Exempt				
176. Westcore Mid Cap Opp - Brokerage #2		None	J	T	Exempt				
177. Westcore Growth - Brokerage #2		None	K	T	Exempt				
178. Westcore MIDCO Growth - Brokerage #2		None	K	T	Exempt				
179. Equitable Variable Life - Alliance Common		None	L	T	Exempt				
180. Equitable Variable Life - Alliance International		None	J	T	Exempt				

1. Income/Gain Codes (See Columns B1 and D4): A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes (See Columns C1 and D3): J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes (See Column C2): Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market; U = Book Value; V = Other; W = Estimated

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Name of Person Reporting	Date of Report
Pratter, Gene E	11/3/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
181. Duane Morris LLP Partnership Capital Account	E	Interest	N	U	Exempt				
182. Carlyle Real Estate LLP	A	Dividend	J	T	Exempt				
183. Wheeler Terrace LTD	A	Dividend	J	T	Exempt				
184. PNC Accounts	A	Interest	K	T	Exempt				
185. Nantucket Bank Account	A	Interest	J	T	Exempt				

1. Income/Gain Codes: A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000
(See Columns B1 and D4) F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000
(See Columns C1 and D3) N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000
P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000
3. Value Method Codes: Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market
(See Column C2) U = Book Value; V = Other; W = Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Pratter, Gene E	11/3/2003

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Pratter, Gene E	11/3/2003

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Gene E Pratter Date November 5, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	52,000	Notes payable to banks-secured	0
U.S. Government securities-add schedule	56,672	Notes payable to banks-unsecured	0
Listed securities-add schedule	5,590,340	Notes payable to relatives	0
Unlisted securities--add schedule	0	Notes payable to others	0
Accounts and notes receivable:		Accounts and bills due (Monthly Household)	10,000
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid income and interest	0
Doubtful	0	Real estate mortgages payable-add schedule	285,000
Real estate owned-add schedule	2,000,000	Chattel mortgages and other liens payable	0
Real estate mortgages receivable	0	Other debts-itemize:	
Autos and other personal property	400,000	Real Estate Tax Bill	9,700
Cash value-life insurance	97,554	Credit Card	28,000
Other assets itemize:			
Duane Morris Partnership Capital Account	359,389		
		Total liabilities	332,700
		Net Worth	8,172,255
Total Assets	8,504,955	Total liabilities and net worth	8,504,955
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule)	NO
On leases or contracts	0	Are you defendant in any suits or legal actions?	NO
Legal Claims	0	Have you ever taken bankruptcy?	NO
Provision for Federal Income Tax	0		
Other special debt	0		

Net Worth Statement
Attached Schedule

US Government Securities

US Treasury Note 6.5% 8/15/05	27,359
US Treasury Note 6.5% 10/15/06	28,313
Total	55,672

Listed Securities

Brokerage #1

Schwab Money Market	18,037
Federated Short Term Muni	32,779
Scudder Short Term Muni	103,940
AT & T Corp	216
Lucent Technologies	35
PMA Capital Corp	129,059
Baron Growth	21,240
DFA Tax Mgd Marketwide Value	27,538
DFA Tax Mgd US Small Cap Value	19,537
First Eagle Overseas	9,984
Janus Adviser International	10,652
Janus Fund	26,176
Julius Baer International Equity	7,626
Morgan Stanley International Equity	8,598
Sound Shore	21,644
Westcore MIDCO Growth	22,495
Total	459,556

Brokerage #2

Schwab Money Market	28,977
Onondaga County, NY Bond	25,083
Federated Short Term Muni	45,124
Scudder Short Term Muni	59,540
ExxonMobil Corp	10,614
General Electric	11,924
Johnson & Johnson	19,362
Kimberly Clark	6,877
SBC Communications	11,748
Baron Growth	13,789
DFA Tax Mgd Marketwide Value	16,103
DFA Tax Mgd US Small Cap Value	11,651
DFA US Micro Cap	5,966
Dodge & Cox Stock	31,139
First Eagle Overseas	13,840

Hotchkis & Wiley Mid Cap Value	22,808
Janus Adviser International	11,284
Janus Fund	11,848
Julius Baer International Equity	11,126
Morgan Stanley International Equity	11,732
NB Fasciano	13,672
Royce Opportunity	18,403
Westcore Growth	19,240
Westcore Mid Cap Opportunity	8,425
Westcore MIDCO Growth	27,326
Total	467,601

Retirement Account #1

Prusky Portfolio	113,519
First Eagle Overseas	138,522
Brandywine	250,526
Sound Shore	250,657
Schwab Inst. Trust Value	293,363
StoneRideg Small Cap Equity	140,094
Vanguard Growth Equity	104,050
Schwab S & P 500	48,678
BlackRock Core Bond	86,016
BlackRock Low Duration Bond	81,286
Schwab Value Advantage	6,158
Bear Stearns International	68,244
Total	1,581,113

Retirement Account #2

Vanguard Total Bond Market Index	16,872
Vanguard 500 Index	20,834
Vanguard International Growth	13,656
PMA Capital	26,669
Total	78,031

Retirement Account #3

Vanguard Total Bond Market Index	16,577
Vanguard 500 Index	18,344
Vanguard International Growth	12,906
Vanguard Windsor II	21,075
Total	68,902

Retirement Account #4

Vanguard Short Term Bond	30,014
Vanguard Windsor II	12,101
Vanguard US Growth	10,469
Vanguard Explorer	14,663
Vanguard Strategic Equity	19,072
Vanguard International Growth	10,568
Total	96,887

Retirement Account #5

Schwab Money Market	714
Federated US Government 1 - 3	15,202
DFA US Large Cap Value	5,537
DFA US Small Cap Value	5,062
First Eagle Overseas	5,866
Janus Adviser International	2,093
Janus Fund	4,573
NB Fasciano	4,339
Sound Shore	4,467
Westcore MIDCO Growth	3,678
Total	51,531

Retirement Account #6

Schwab Money Market	3,499
Federated US Government 1 - 3	6,901
PMA Capital	37,590
Janus Adviser International	2,269
MFS Mass Investors Trust	3,843
Royce Opportunity	3,885
Thornburg Value	3,164
Total	61,151

Retirement Account #7

Schwab Money Market	14,636
Federated US Government 1 - 3	260,380
DFA One Year Fixed	207,336
Baron Growth	78,037
Bear Stearns International	51,951
Brandywine	88,628
Columbia Growth	79,629
DFA US Large Cap Value	186,545
DFA US Micro Cap	26,782
DFA US Small Cap Value	10,507
Dodge & Cox Stock	246,705
First Eagle Overseas	70,045
Hotchkis & Wiley Mid Cap Value	96,236
Julius Baer International	33,285

Morgan Stanley Emerging Markets	26,881
Morgan Stanley International	66,096
Royce Opportunity	162,863
StoneRidge Small Cap Equity	53,187
Vanguard Growth Equity	89,246
Westcore Growth	53,758
Westcore International Frontier	36,372
Westcore Mid Cap Opportunity	99,249
Westccore MIDCO Growth	88,291
Total	2,126,645

Trust #1

Schwab Money Market	15,936
Schwab Muni Money Market	275,000
Scudder Short Term Muni	73,905
SBC Communications	24,431
Total	389,272

Custodial #1

Schwab Money Market	3,622
DFA One Year Fixed	31,669
Federated US Government 1 - 3	20,510
Johnson & Johnson	9,904
PMA Capital	43,855
Dodge & Cox Stock	15,928
First Eagle Overseas	6,012
Janus Fund	12,834
Julius Baer International	8,974
Morgan Stanley International	5,775
NB Fasciano	9,442
Royce Opportunity	13,370
Westcore Mid Cap Opprtunity	12,753
Westcore MIDCO Growth	11,003
Total	205,651

Carlyle Real Estate LP	2,000
Wheeler Terrace LTD	2,000
Total Listed Securities	5,590,340

Real Estate Owned

Pennsylvania Home	1,400,000
Massachusetts Home	600,000
Total	2,000,000

Real Estate Mortgages Payable

Chase Bank	97,000
Roxborough/Manayunk Bank	171,000
Nantucket Bank	17,000
Total	285,000

Senator KYL. As I said, that is a testament. We understand that none of us are here without the support of a lot of other folks, and it is nice to be able to recognize them.

Neil Vincent Wake, opening statement and/or introduce members of your contingent here.

STATEMENT OF NEIL VINCENT WAKE, NOMINEE TO BE DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

Mr. WAKE. Thank you, Mr. Chairman. I have no opening statement, but I, too, want to thank President Bush for submitting my name, and I want to thank this Committee and the Senate for their consideration of my nomination.

I also want to express my thanks to Senator McCain and to you, Mr. Chairman, for your support as well.

I'd like to introduce my family. I've got a pretty good contingency here because I have eight brothers and sisters, and a fair number of them are here.

First let me start with my wife, Shari Capra. And my brother, Dan Wake. Dan is the other lawyer in the family, from Denver. And my sister, Joy Wake. And another brother, Ward Wake. And also Ward's family, his wife, Syllvette Wake, and—she may have stepped out. She stepped out. Oh, well. The reason she probably stepped out is because of the children that she brought: Chantall, who is perhaps not here either, and Aiden, who is only 1 year old. So that probably—

Senator KYL. She is excused.

[Laughter.]

Mr. WAKE. And I also have some very dear friends that I'd like to introduce: Dr. Karen Rigamonti and her daughter, Eva Rigamonti. They are very dear friends of ours from Phoenix, who have lived in Baltimore for quite a while, and they have come down. I want to express my thanks to all of them for being here.

Senator KYL. Thank you all very much for your attendance here today.

[Applause.]

[The biographical information follows:]

QUESTIONNAIRE FOR NOMINEES REFERRED TO THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used): **Neil Vincent Wake**

2. Address: List current place of residence and office address.

Residence: Phoenix, AZ

Office: Law Offices of Neil Vincent Wake
3030 N. 3rd Street, Suite 1220
Phoenix, AZ 85012

3. Date and place of birth: **July 2, 1948, Phoenix, AZ.**

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address.

Shari Magdalene Capra
Occupation: self-employed attorney and mediator
Shari M. Capra, P.C.
3030 N. 3rd Street, Suite 1220
Phoenix, AZ 85012

5. Education: List each college and law school you attended, including dates of attendance, the degrees received, and dates degrees were granted.

Law: Harvard University, Cambridge, MA, 1971-1974. J.D., cum laude, June 1974.

College: Arizona State University, 1968-1971, BA with high distinction, February 1991.

St. Mary's Seminary, Santa Barbara, CA, and Perryville, MO, 1966-1968 (left to transfer to Arizona State University). These schools have been closed.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Proprietor (January 1999 to present)
Law Offices of Neil Vincent Wake,
3030 N. 3rd Street, Suite 1220
Phoenix, AZ 85012-3050

Partner (1994-1998)
Bryan Cave LLP
Two N. Central Ave, Suite 2200
Phoenix, AZ 85004-4406

Proprietor (1989-1994)
Law Offices of Neil Vincent Wake
340 E. Palm Lane, Suite 275
Phoenix, AZ 85012

Partner (1982-1989)
Beus, Gilbert, Wake & Morrill
3200 N. Central Ave., Suite 1000
Phoenix, AZ 85004

Partner (1978-1982) and Associate (1974-1977)
Jennings, Strouss & Salmon
Two N. Central Ave., Suite 1600
Phoenix, AZ 85004

Summer law clerk (June-September 1973)
Brown and Bain PA
2901 N. Central Ave., 20th Floor
P.O. Box 400
Phoenix, AZ 85001-0400

Summer law clerk (June-August 1972)
Jennings, Strouss & Salmon
Two N. Central Ave., Suite 1600
Phoenix, AZ 85004

Intern (January-August 1971)
Office of the Mayor
City of Phoenix
200 W. Washington
Phoenix, AZ 85003

National Board of Visitors of The University of Arizona College of Law, 1995 to present.

Community Legal Services, Board of Directors, 1976 to 1981 (legal services provider in central Arizona).

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Fellow of the American Academy of Appellate Lawyers, 1993 to present. Chairman, Appellate Rules and Standards Committee, 1997 to present. The Academy consists of 259 members nationwide. Admission is by invitation.

National Board of Visitors of The University of Arizona College of Law, 1995 to present.

Arizona State University academic scholarship (tuition waiver), 1968-1971,

Phi Kappa Phi Honor Society, 1970.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conference of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

State Bar of Arizona, 1974 to present.

Appellate Practice Section, 1996 to present. Chair, 2003-2004; Chair-Elect, 2002-2003; Budget Officer, 2001-2002; Secretary, 2000-2001.

Appellate Handbook Committee, 1979 to present. This Committee writes and updates the three-volume Arizona Appellate Handbook, a treatise on Arizona appellate practice and administrative law.

Committee on Civil Practice and Procedure, 1983 to 1992 and 1996 to present; Chairman, Subcommittee on Rules of Civil Appellate Procedure, 1991 to 1992. This Committee advises the Arizona Supreme Court on all proposed civil rules changes.

Indian Law Section, 1990 to present.

Arizona State Bar Journal, Editorial Board, 1978 to 1982.

American Bar Association, 1974 to present.

Section of Litigation and Appellate Litigation Committee since about 1983.

Family Law Section, since mid-1990's.

Maricopa County Bar Association, 1974 to present.

Navajo Nation Bar Association, 1978 to present.

Federal Bar Association, at various times and continuously since 1999.

Horace Rumple Inn of Court, 1990 to 2001.

Committee on Video Transcription, Council on Judicial Administration of the Supreme Court of Arizona, 1989 to 1991.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Organizations that lobby:

American Radio Relay League (national amateur radio club; lobbies the FCC), member, 1982 to present.

Organizations that do not lobby:

Community organizations:

Co-Founder and Member, ICU Care Parents, 1983 to mid-1990s (support group for parents of critically ill newborns). ICU Care Parents later merged with Pilot Parents (support group for handicapped children and their parents).

Community Legal Services, Board of Directors, 1976 to 1981 (legal services provider in central Arizona).

Educational organizations:

Class Committee, Harvard Law School Class of 1974, since 1970's.

Arizona State University Alumni Association since about 1980.

Arizona State University College of Liberal Arts Alumni Association since about 1980.

Friends of the Philosophy Department (Arizona State University), since mid 1990's.

11. Court Admissions: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships have lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Arizona, 1974
Colorado, 2001
Supreme Court of the United States, 1977
Navajo Nation, 1978
United States District Court for the District of Arizona, 1974
United States Courts of Appeals for the Fifth, Ninth (1975), Tenth, and District of Columbia (1977) Circuits
United States Tax Court, 1976
United States Court of Federal Claims, 1977

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal

policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Publications (copies submitted herewith):

***Arizona Appellate Handbook*, Chapter 31 (General Principles of Administrative Review) and Chapter 32 (The Administrative Review and Procedure Acts) (State Bar of Arizona, 1980, 1991, 1998, and 2001).**

"Appellate Settlement Program Starts at Court of Appeals, Div. One" *Arizona Attorney* (January 1996) (appellate court mediation program).

"How Not to Write Rules: The Rules of Procedure For Judicial Review of Administrative Decisions," *Arizona Attorney* (October 1994) (critique of court rules).

"Federal Appellate Practice: Ninth Circuit -- A Must For Every Appellate Practitioner," *Appellate Practice Journal and Update* (American Bar Association Section of Litigation, Winter 1994) (book review).

"Megamanual For the Megacircuit," *Arizona Attorney* (July 1994) (book review).

"The Notice of Change of Opposing Counsel and Other Rules Whose Time Has Come," *Arizona Attorney* (March 1994) (humor).

"The Board of Governors and the 'R' Word," *Arizona Attorney* (August/September 1993).

"Tentative Opinions: A Bad Idea Whose Time Ought Not Come," *Appellate Practice Journal and Update* (American Bar Association Section of Litigation, Summer 1993) (commentary on pre-argument release of draft appellate decisions).

Speeches:

In October 2002, I spoke without prepared text at an Arizona State University College of Law forum on tribal gambling initiatives to be voted on at the November 2002 general election.

Other than that, I have not given speeches as such, but I have spoken at the following continuing legal education programs. All presentations

were from outlines alone, not from prepared text, and except where noted below the outlines have not been retained:

2003: on Arizona Court of Appeals and Arizona Supreme Court practice at Arizona State Bar Association programs.

2003, 2001, 1999, 1997, 1995, and 1993: Arizona Appellate Practice Institute, faculty member.

2002, 1999, 1997 and 1996: on Ninth Circuit federal appellate practice at Arizona State Bar and Federal Bar Association programs (written outline submitted herewith).

2003, 2001, 1991, 1986, and 1980: on judicial review of administrative action at Arizona State Bar programs (most recent written outline submitted herewith).

1999: on jurisdiction of tribal, state, and federal courts at the Arizona State Bar Convention (written outline submitted herewith).

1998: on tribal self-government and commercial gambling at the Arizona State Bar (written outline submitted herewith).

1992: on federal court review of tribal government action at the Arizona State Bar Convention.

1991 and 1992: on post-trial and appellate procedure.

1988: on trademark and trade dress litigation at the Convention of the U. S. Trademark Association.

1978: on jurisdictional problems of businesses located on Indian reservations at a Federal Bar Association program.

13. Health: What is the present state of your health? List the date of your last physical examination.

My health is good, and I have no medical conditions that could interfere with my ability to fulfill my duties.

My last physical examination was on August 20, 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have never held permanent judicial office. I have served as a judge pro tempore of the Arizona Court of Appeals, Division One, in October

1985, October 1992, April 1996, December 1997, and December 1998. I decided 15 cases and authored decisions in five cases, plus one dissent. In accordance with the policy of the Court, none of the decisions was published. Copies of the unpublished Memorandum Decisions I authored are submitted herewith.

I have served as court-appointed arbitrator in about eight Arizona Superior Court non-binding arbitrations.

I have been appointed arbitrator by the U.S. District Court for the District of Arizona for commercial disputes pursuant to 28 U.S.C. §651.

15. If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as a clerk to a judge, and if so the name of the judge, the court, and the dates of the period you were a clerk. **No.**

2. Whether you practiced alone, and if so, the dates addresses and the dates.

During my sole proprietorship practice from July 1989 to January 1994 and from January 1999 to present, I employed attorneys at most times, but I was a sole practitioner in July-

August 1989 (2850 N. Central Ave., Phoenix, AZ) and January-March 1999 (3030 N. 3rd St, Suite 1220, Phoenix, AZ).

3. The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, the nature of your connection with each.

Associate (1974-1977) and Partner (1978-1982),
Jennings, Strouss & Salmon
Two N. Central Ave., Suite 1600
Phoenix, AZ 85004

Partner (1982-1989)
Beus, Gilbert, Wake & Morrill
3200 N. Central Ave., Suite 1000
Phoenix, AZ 85004

Proprietor (January 1989 to January 1994)
Law Offices of Neil Vincent Wake
340 E. Palm Lane, Suite 275
Phoenix, AZ 85012

Partner (1994-1998)
Bryan Cave LLP
Two N. Central Ave, Suite 2200
Phoenix, AZ 85004-4406

Proprietor (January 1999 to present)
Law Offices of Neil Vincent Wake
3030 N. 3rd Street, Suite 1220
Phoenix, AZ 85012-3050

b. 1. What has been the general character of your practice, dividing it into periods with dates its character changed over the years.

I. SUMMARY.

My practice has consisted of business, administrative, and public law litigation, trials and appeals in all levels of state and federal courts, including:

Trial Experience: preparation, pre-trial litigation, trial, and negotiation of business and administrative disputes. Very many of these disputes

reach negotiated settlements at some point in the litigation process, so negotiation is a substantial part of my litigation practice. Trial court litigation has been 40% to 70% of my work, varying from year to year, and about 60% of my work overall.

Appellate Experience: sole or primary responsibility for about 150 civil appeals and other appellate court proceedings in all levels of Arizona and federal courts. Appellate litigation has been 30% to 60% of my work, varying from year to year, and about 40% of my work overall. My appellate accomplishment is recognized in my election to the American Academy of Appellate Lawyers in 1993 and my election as Chair of the Appellate Practice Section of the State Bar of Arizona in 2003.

II. SUBSTANTIVE AREAS OF EXPERIENCE.

My trial and appellate litigation has included substantial work in the following fields:

Administrative law: judicial review of state and federal administrative action.

Constitutional law: due process, equal protection, voting rights matters relating to state agencies and political subdivisions, defense of constitutionality of state statutes; state constitutional challenge to public funding of stadium for private sports team; federal and state constitutional challenge to state-grated tribal gambling monopoly.

Election law: redistricting of Congressional and legislative districts; defense of statewide initiatives; Voting Rights Act applicability, compliance, and challenges, including language minority provisions and vote dilution; nominating petition challenges.

Federal Indian law: regulatory and taxing authority of state, tribal, and federal governments; validity of State-Tribal gaming compacts and state authority to compact for gaming; federal Indian property law; planning for businesses located on Indian reservations; negotiation and drafting of commercial leases of tribal lands; administrative and judicial enforcement of tribal leases; Indian gaming litigation, including validity of tribal-state gaming compacts and forms of gaming; litigation in tribal courts.

Real estate: acquisition, development, construction, property rights, land use regulation, deed restrictions, deeds of trust and mortgages, foreclosure and other creditors' rights, commercial and agricultural leases, adverse possession, title insurance, valuation, lis pendens liability.

Corporate: director and shareholder disputes, fiduciary duties, control rights, and corporate financing.

Commercial transactions: Uniform Commercial Code sales, security interests, commercial paper, remedies of secured parties, guarantor liability, commercial and real estate loans.

Securities: securities fraud, Arizona and federal.

Insurance: duties of insurers, coverage disputes, bad faith in processing claims and defending liability claims, insurer rehabilitation, reinsurance disputes, ERISA preemption, defense of claims as insurer-appointed counsel, insurance regulation; third-party bad faith claims between insurers.

Partnership and professional corporations: dissolution, fiduciary duties, contract disputes, creditors' claims, liabilities of shareholders and partners, valuation.

Business and property valuation.

Legal malpractice: prosecution, defense, and expert testimony.

Trademark and unfair competition: trademark and trade dress infringement, common law unfair competition.

Racketeering: Arizona and federal.

Class actions: representation of class representatives and defense of class actions.

Preliminary injunctions and temporary restraining orders: prosecution and defense, in business contexts and against government officials.

Civil rights and related state and municipal tort liability.

2. Describe your typical clients, and mention the areas, if any, in which specialized.

Business clients of all types, from large Arizona or national business corporations, such as Arizona Public Service Company, Salt River Project (water reclamation and electric utility), and insurance companies, to small and medium size closely held concerns, such as real estate, retail, professional, and financial businesses. In constitutional, administrative, and election litigation, I have represented government entities, public officials, and individuals and businesses challenging government action. I have also represented many individual clients in diverse matters.

The majority of my practice has been in commercial and public law litigation, trial and appellate. My substantive areas of concentration

include constitutional litigation, judicial review of government action, federal Indian law, and injunction litigation.

c. 1. Did you appear in court frequently, occasionally or not at all? If the frequency of you appearances in court varied, describe each such variance, giving dates.

Frequently.

2. What percentage of these appearances was in:

(a) Federal courts. **20%**

(b) State courts of record. **79%**

(c) Other courts (tribal). **1%**

3. What percentage of your litigation was:

(a) Civil. **100%**

(B) Criminal. **0%**

4. State the number of cases you tried to verdict or judgment (rather than settled) in courts of record, indicating whether you were sole counsel, chief counsel, or associate counsel.

About 25 trials and about 15 preliminary injunctions
I was sole or lead counsel in all but one, in which responsibility was divided with another attorney.

5. What percentage of these trials was:

(a) Jury. **Two trials, six and seven weeks.**

(b) Non-jury. **All others.**

18. Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. ***White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980), *rev'g*, 120 Ariz. 282, 585 P.2d 891 (App. 1978) (implied federal preemption of state taxes on non-Indians on Indian reservations). I was trial counsel and appeal counsel for plaintiffs White Mountain Apache Tribe and Pinetop Logging Company in all courts.**

Date of Proceedings: 1974-1980.

Courts and Judges: (a) Supreme Court of the United States.

(b) Arizona Court of Appeals, Div. One, Judges Eino M. Jacobson, William E. Eubank, and Jack Ogg.

(c) Maricopa County Superior Court, Judge Roger G. Strand (now Senior U.S. District Judge).

Counsel:

Co-counsel: Hon. Michael J. Brown
Pima County Superior Court
110 W. Congress Room 450
Tucson, AZ 85701
Tel: 520-740-8782
The role of Mr. Brown, the regular attorney for the White Mountain Apache Tribe, was limited to reviewing my brief on the merits in the Supreme Court of the United States and sharing in oral argument in the Supreme Court of the United States. I had sole responsibility for all the rest of the litigation since 1974 in the state courts and in the Supreme Court of the United States.

Opposing counsel: Ian A. Macpherson
Ryan Woodrow & Rapp PLC
3101 N. Central, Suite 1500
Phoenix, AZ 85012
Tel: 602-280-1000

Substance of the Case: The White Mountain Apache Tribe contracts out the cutting and hauling portions of its timber harvest and milling enterprise. The State attempted to collect gross receipts and motor fuel taxes from non-Indians contracted by the Tribe for such services. The non-Indian logger and the Tribe contended that such taxes, though not explicitly prohibited by federal law, are implicitly forbidden by the comprehensive federal scheme for regulation of Indian timber. I began working on this case on my first day of work out of law school, and I soon took primary responsibility for the case. We lost the case in the Superior Court and in the Arizona Court of Appeals. I prepared the petition for certiorari to the U.S. Supreme Court, which accepted the case and ruled in favor of the logger and the Tribe. I solely or principally authored the appeal briefs in all appellate courts and argued the case in all appellate courts with co-counsel Michael Brown, the regular attorney for the Tribe.

Significance of the Case: This case is one of the leading precedents on implied federal preemption of state laws applicable to non-Indians involved in activities for the benefit of Indians. The U.S. Supreme Court has principally relied on *White Mountain Apache Tribe v. Bracker* for its decisions in 4 to 5 cases since then, usually looking back to *Bracker* for its fundamental analysis of such problems. *Bracker* has been cited by hundreds of lower court decisions and is the subject of substantial scholarly commentary. It is a leading case in the law school casebooks on federal Indian law. Perhaps the broadest holding of the case is that general standards for federal preemption of state laws do not apply in Indian law cases, where preemption may be found on lesser standards.

2. *American Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (Indian tribes are indispensable parties to action to enjoin state Governor from renewing illegal tribal-state gaming compacts, in whose absence the action cannot proceed), *rev'g* 146 F. Supp. 2d 1012 (D. Ariz. 2001) (state statute authorizing Governor to enter into state-tribal gaming compacts pursuant the federal Indian Gaming Regulatory Act violates separation of powers; compacts purporting to allow types of tribal gambling prohibited by state statutes are invalid). I was trial counsel and appeal counsel for the plaintiffs American Greyhound Racing, Inc., and other racetracks in all courts.

Date of proceedings: 2000-2002.

Courts and Judges: (a) U.S. District Court for the District of Arizona, Judge Robert C. Broomfield.

(b) U.S. Court of Appeals for the Ninth Circuit, Judges Pamela Ann Rymer, William C. Canby, Jr., and Senior District Judge William Bertelsman of Kentucky.

Counsel:

Opposing counsel: W. Scott Bales
Lewis and Roca LLP
40 N. Central Ave.
Phoenix, AZ 85004
Tel: 602-262-5311

Substance of the Case: Racetracks in Arizona brought proceedings to restrain the Governor from renewing or extending tribal-state gaming compacts that purported to allow tribes to engage in slot machine gaming and other forms of gaming that are prohibited by Arizona statutes. In a 120 page opinion, the District Court granted relief, holding those forms of gaming are illegal in Arizona and that the Federal Indian Gaming Regulatory Act does not purport to authorize tribal-state gaming compacts for forms of gaming prohibited by general state statutes. In a divided opinion, the Court of Appeals ordered the action dismissed, holding Indian tribes are indispensable parties who cannot be joined. Several other jurisdictions had held to the contrary on the same point of indispensable parties law, and the highest state courts in Wisconsin and New York have rejected the Ninth Circuit's holding

Significance of the Case: This case challenged the legality of the tribal casino gambling industry that has grown up in Arizona. The substantive legality of tribal-state gaming compacts purporting to allow tribal monopolies in forms of gambling that state statutes prohibit to all other persons remains undecided. The procedural ground upon which the divided Ninth Circuit panel ordered the case dismissed (indispensable parties) has since been rejected by the Wisconsin Supreme Court and the New York Court of Appeals in materially identical cases.

3. *Smith v. Salt River Project Agricultural Improvement and Power District*, 109 F.3d 586 (9th Cir. 1997)(validity of water and power district's landowner voting system under the Voting Rights Act). I was co-counsel in the trial court and lead counsel on appeal for defendant and appellee Salt River Project.

Date of Proceedings: 1993-1997.

Courts and Judges: (a) U.S. Court of Appeals for the Ninth Circuit, Judges Betty B. Fletcher, Cynthia Holcomb-Hall, Jerome Farris.

(b) U.S. District Court for the District of Arizona, Judge Stephen M. McNamee.

Counsel:

Co-counsel: Gary Lassen and John J. Egbert
Jennings, Strouss & Salmon PLC
201 E. Washington St. 11th Floor
Phoenix, AZ 85004-2385
Tel: 602-262-5940
Mssrs. Lassen and Egbert and I had co-equal responsibility and duties in preparing the case for trial, which was reduced almost entirely to an agreed statement of facts. Mr. Lassen was lead counsel at the trial itself. I was lead counsel on appeal.

Opposing counsel: Timothy M. Hogan
Arizona Center for Law in the Public Interest
202 E. McDowell, Suite 153
Phoenix, AZ 85004
Tel: 602-258-8850

Substance of the Case: Challenge under § 2 of the Voting Rights Act of 1965 to the landowner voting system of the Salt River Project, a water and power district, based on the disparate impact of the landowning requirement on African-Americans, who own their homes with less frequency than whites.

Significance of the Case: This was the first case to address whether and how the under the Voting Rights Act applies to land-based, land-improvement districts, such as irrigation districts. It has broader doctrinal value as well since it rejects Voting Rights Act liability from mere statistically disparate impact of voting practices upon protected minorities. Finally, the case posed serious consequences for the Salt River Project, an acreage-voting water and power district. If the case had been lost, the control and benefit of the Project would have been shifted from the investor landowners to the electric customers in general.

4. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128 (9th Cir. 1995), *rev'g, Arizona Public Service Company v. Office of Navajo Labor Relations,* 23 Ind. Law Rep. 2063 (Navajo Nation Supreme Ct. 1990) (tribal ordinance regulating labor relations violates federal lease precluding tribal regulation; federal court has jurisdiction to enforce tribal waivers of regulation of non-Indians). I was trial counsel and appeal counsel for plaintiff and appellee Arizona Public Service Company.

Date of Proceedings: 1989-1995.

Courts and Judges: (a) U.S. Court of Appeals for the Ninth Circuit, Judges Mary M. Schroeder, J. Clifford Wallace, Stephen S. Trott.

(b) U.S. District Court for the District of Arizona, Judge Robert C. Broomfield.

Counsel:

Opposing counsel:Eric N. Dahlstrom
Rothstein Donatelli Hughes Dalstrom Schoenburg & Enfield LLP
40 N. Central Ave., Suite1420
Phoenix, AZ 85004
Tel: 602-252-3226

Substance of the Case: Beginning in 1960 a consortium of five electric utilities in four states entered into a series of leases with the Navajo Nation pursuant to which they spent about a billion dollars to build a coal-burning power plant on tribal lands near Farmington, NM. Substantial coal royalties and rents are paid to the Nation, and Indians enjoy an employment preference under the terms of the leases. However, the lease provisions extinguish tribal regulatory power over the Plant, its operations, and its policies except as expressly permitted in the leases. In 1985 the Nation enacted a comprehensive employment relations law and began to enforce it against the Plant, arguing that as a sovereign the Nation can enact laws that override the terms of its leases. The Navajo Nation Supreme Court upheld the Nation's claim, but the U.S. District Court and the U.S. Court of Appeals held the Nation may not enact laws that have the effect of overriding terms of a federally approved lease of tribal land.

Significance of the Case: This case is a major precedent concerning the powers of Indian tribes and the relation between tribal sovereignty and the administration of Indian affairs by federal executive officials. It is also an important precedent for the economic development of Indian reservations since, if it had been decided the other way, businesses investing large amounts of capital on Indian reservations would not be able to rely upon their agreements with tribes. Finally, the case has specific significance for employment relations of non-Indian employers since over 100 tribes have enacted employment laws similar to the Navajo law at issue in this case. This case gives tribes and investor/ employers the flexibility to determine the extent of tribal employment regulation at the time the investor/employer decides whether to locate on the reservation. That flexibility will likely encourage greater investment and employment on Indian reservations.

5. *Arizonans For Fair Representation, Inc. v. Symington*, 828 F. Supp. 684 (D. Ariz. 1992) (three-judge court), *aff'd*, 113 S.Ct. 1573 (1993) (redistricting of Arizona Congressional districts). I was trial counsel.

Date of the Proceedings: 1992-1993.

Courts and Judges: (a) U.S. District Court for the District of Arizona, District Judges Stephen M. McNamee and Alfredo C. Marquez and Circuit Judge Charles E Wiggins.

(b) Supreme Court of the United States.

Counsel:

I presented plaintiff Arizonans for Fair Representation, Inc., a non-profit corporation that represented the interests of incumbent Republican Congressmen. Six separately represented parties actively participated in the trial. I filed the action, tried the case as sole counsel for my clients, and prepared, with the cooperation of counsel for another party, the redistricting plan adopted by the court, with minor modifications.

Cooperative counsel for separate parties:

Joe P. Sparks
Sparks Tehan & Ryley PC
7503 First St., Scottsdale, AZ 85251
Tel: 480-949-1339

Principal opposing counsel:

Gov. Janet Napolitano (representing Arizona State Senate [Democratic Party interests])
1700 W. Washington
Phoenix, AZ 85007
Tel: 602-542-5025

Jose de J. Rivera (representing Mexican-American Legal Defense Fund)
Haralson Miller Pitt & McAnally PLC
3003 N. Central, Suite 1400,
Phoenix Arizona 85012
Tel: 602-604-2151

Lisa T. Hauser (represent the Governor and the Secretary of State of Arizona)
Gammage & Burnham, PLC
Two N. Central Ave., 18th Floor
Phoenix, AZ 85004
Tel: 602-256-4566

Substance of the Case: This was an action to redistrict Arizona's congressional districts after the 1990 census, the legislature having deadlocked on enactment of a redistricting plan. I represented the plaintiff, a non-profit corporation that represented the interests of four incumbent Republican Congressmen. The case was tried for five days to a three-judge federal district court, with direct appeal to the U.S. Supreme Court. Both Republican and Democratic interests in the state legislature proposed plans of redistricting which were political gerrymanders. My clients supported a non-political redistricting plan that would create as many competitive districts as possible. We supported (and helped prepare) a plan proposed by Indian interests that respected traditional criteria of good districting and grouped tribes with common cultural, historical, and political interests in the same congressional districts. The Court accepted our alternative plan, with minor modifications, and the U.S. Supreme Court affirmed.
Significance of the Case: This case has had important effect on the federal political process in Arizona. The politically competitive districts we proposed resulted in spirited elections in some districts and seats changing hands several times. Our plan has been beneficial to Indian peoples in particular.

6. *Dial Mfg. International, Inc. v. McGraw-Edison Co.*, 657 F.Supp. 248 (D. Ariz. 1987), *aff'd* 833 F.2d 1015 (9th Cir. 1987) (unfair competition, Arizona Racketeering law). I represented plaintiff and appellee Dial Mfg. International, Inc. I became lead trial counsel six weeks before trial and was lead appeal counsel.

Date of Proceedings: 1986-1987 (period of my involvment).

Courts and Judges: (a) U.S. Court of Appeals for the Ninth Circuit.

(b) U.S. District Court for the District of Arizona, Judge Charles L. Hardy.

Counsel:

Opposing counsel: Robert C. Hackett
Mohr Hackett Pederson Blakey & Randolph PC
2800 N. Central Ave., Suite 1100
Phoenix, AZ 85004
Tel: 602-240-3000

Substance of the Case: This was an action for business fraud, scheme or artifice to defraud, and various other claims between two businesses exporting to the government of Iraq. The two companies agreed to jointly bid on a multi-year procurement contract, but the defendant secretly bid on its own, using the higher bids by the plaintiff to make its secret bid appear more favorable. I entered the case about six weeks before trial as lead counsel. After a six-week trial, the jury returned a verdict for our client for almost $1,000,000, which was trebled pursuant to Arizona law. The verdict and judgment were affirmed by the U. S. Court of Appeals for the Ninth Circuit.

Significance of the Case: This case presented significant trial challenges, as the defendant had engaged in a fraudulent course of conduct that could be proved only by indirect evidence. Moreover, many of the key witnesses were government officials in Iraq unavailable for testimony or deposition due to the deterioration in relations between Iraq and the United States. Substantial and close legal questions were extensively briefed in the case. The judgment of $3,300,000 ultimately paid saved our client from financial destruction after 40 years in business.

7. *United Farm Workers of America, AFL-CIO v. Arizona Agricultural Employment Relations Board*, 727 F.2d 1475 (9th Cir. 1984) (en banc) (constitutionality of the Arizona Agricultural Employment Relations Act). I was trial counsel and appeal counsel. The general counsel for the Board, Mr. Gibney, was also counsel of record, but I did all the substantive work at trial and on appeal.

Date of Proceedings: 1980-1984.

Courts and Judges: (a) U.S. Court of Appeals for the Ninth Circuit (en banc), Judges James R. Browning, Herbert Y.C. Choy, Alfred T. Goodwin, Warren J. Ferguson, Procter Hug, Jr., Otto R. Skopil, Jr., Harry Pregerson, Cecile F. Poole, Mary M. Schroeder, Betty B. Fletcher.

(b) U.S. District Court for the District of Arizona, Judge Charles L. Hardy.

Counsel:

I represented the defendant Arizona Agricultural Employment Relations Board.

Co-counsel: William Gibney
4545 E. Shea, # 101
Phoenix, AZ 85258
Tel: 602-953-0006

Opposing counsel: Ellen Eggers
Current address unknown

Substance of the Case: The Arizona Agricultural Employment Relations Board was created to resolve disputes between agricultural employers and workers over terms and conditions of employment. The Board consists of equal numbers of members representing employers and workers, with neutral public members having the controlling votes. The United Farm Workers Union brought this action challenging the presence of party-representatives on the Board as inherently unfair and therefore a denial of Due Process of Law. A divided three-judge panel of the U.S. Court of Appeals for the Ninth Circuit struck down the law, but the full Court granted rehearing before an en banc panel of eleven judges. The en banc panel ruled unanimously that the even balancing of party representative members on the Board does not violate Due Process of Law.

Significance of the Case: This case is a significant precedent in constitutional law and administrative law. The use of tri-partite regulatory boards that include representatives of the competing regulated interests is not rare. This case upheld the constitutionality of such administrative composition.

8. *Andrews v. Blake*, 205 Ariz. 236, 69 P.3d 7 (2003) (standards for equitable relief from strict time limit for exercising option to purchase land contained in a lease). I was lead counsel for petitioner Blake on appeal in the Arizona Supreme Court and did the principal briefing and the oral argument.

Date of Proceedings: 2002-2003 (period of my involvment).

Court: Arizona Supreme Court, Justices Charles E. Jones, Ruth V. McGregor, Michael D. Ryan, and Judges J. William Brammer, Jr., and John Pelander sitting by designation.

Counsel:

Co-counsel: Timothy J. Thomason
Mariscal Weeks McIntyre & Friedlander PA
2901 N. Central Ave., Suite 200
Phoenix, AZ 85012
Tel: 602-285-5000

Michael Korenblat
Quarles and Brady Streich Lang LLP
Two N. Central Ave.
Phoenix, AZ 85004
Tel: 602-229-5318
Mssrs. Thomason and Korenblat assisted in the briefing in the Arizona Supreme Court.

Opposing Counsel:
Paul G. Ulrich
2232 E. Shea Blvd
Phoenix, AZ 85028
Tel: 602-248-9465

Curtis D. Drew
2342 N. Pima Road
Scottsdale, AZ 85257
Tel: 480-994-5796

Substance of the Case: A lessee claimed to have exercised an option to purchase the leasehold property, which the lessor disputed. The case turned on whether disputed notice given in a manner other that specified in the lease is effective and alternatively whether the strict for giving notice could be equitably excused if there is no prejudice to the lessor. In an unpublished decision, the intermediate appellate court had ruled in favor of the lessor on both points. I was retained to petition the Arizona Supreme Court for review, which was granted. The Supreme Court reinstated the lessee's claim based on the disputed giving of notice in a manner not specified in the lease.

Significance of the Case: This case resolves a question on which other jurisdictions are closely divided, rejecting the view of the Corbin on Contracts treatise that the strict time for exercising an option in a lease can be equitably tolled.

9. *Regner v. Bayless*, 199 Ariz. 182, 16 P.3d 209 (2001) (limitation of initiatives for amendment of Arizona Constitution to a single subject). I was trial and appellate counsel for defendant USWest Communications.

Date of Proceedings: 2000-2001.

Courts: (a) Arizona Supreme Court, Justices Charles E. Jones, Ruth V. McGregor, Stanley G. Feldman, Thomas Zlaket

(b) Arizona Superior Court, Maricopa County, Judge Jeffrey Cates.

Counsel:

Opposing Counsel:

Hon. Andrew D. Hurwitz
Arizona Supreme Court
1501 W. Jefferson
Phoenix, AZ 85007
Tel: 602-542-4532

Substance of the Case: USWest Communications sponsored an initiative to amend the Arizona Constitution so as to put all telephone service providers on the same basis of rate regulation. Technical provisions of the constitution required subjected USWest Communications to costly and slow rate regulation but exempted its competitors in the current deregulated environment, preventing USWest from reducing its rates promptly to meet competition. Competitors such as Cox Communications and AT&T brought this action to disqualify the initiative from the ballot on the ground that the petition violated the single-subject requirement of the state constitution. The trial court ruled in our client's favor, which was affirmed on direct appeal to the Arizona Supreme Court.

Significance of the Case: This case and two others that were decided at the same time by the Arizona Supreme Court gave major reformulation to the single subject rule, which had been articulated poorly in earlier cases.

10. *Gerow v. Covill*, 192 Ariz. 9, 960 P.2d 55 (Ct. App. 1998) (husband's transfer of good will in sole proprietorship in fraud of wife by incorporating business in the name of another; fiduciary duty of divorcing spouses to preserve marital business assets for benefit of the marital community). I was appeal counsel for Appellee Wife in the appeal and did all the appeal work.

Date of Proceedings: 1996-1998 (period of my involvement).

Court: Arizona Court of Appeals, Div. One; Judges Jefferson Lankford, Sarah Grant, William F. Garbarino.

Counsel:

Co-counsel: Robert A. Jensen
Jensen & Pollitt PLC
3101 N. Central Ave., Suite 820
Phoenix, AZ 85012
Tel: 602-230-1118
Mr. Jensen was trial counsel.

Opposing counsel: Robert L. Schwartz
Mariscal Weeks McIntyre & Friedlander PA
2901 N. Central Ave., Suite 200
Phoenix, AZ 85012
Tel: 602-285-5000

Substance of the Case: In a marital dissolution proceeding, Wife sought compensation for Husband's covert transfer of the good will value of his sole proprietorship business by incorporating it in the name of a relative. Trial counsel obtained a judgment favorable to Wife, which I sustained on appeal.

Significance of the Case: This case establishes in Arizona the principle that divorcing spouses have fiduciary duties to manage and preserve marital property for the best advantage of both spouses, notwithstanding their conflict and adversary dealings.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.

Almost all the legal work I have done has been litigation and related dispute resolution. The ten cases summarized in response to the previous question illustrate the breadth of my litigation experience. Other matters described below are not necessarily the most significant legal activities I have pursued but rather are listed because they illustrate matters that did not reach a litigated resolution.

1. **Family dispute and partition of real property litigation, in the Maricopa County Superior Court.**

Date of Proceedings: 1989-1993.

Court and Judge: Maricopa County Superior Court, Judge Susan Bolton (now U.S. District Judge).

Counsel:

I represented one branch of the family.
Opposing counsel: Ronald A. Schlosser
P. O. Box 340
Litchfield Park, AZ 85340
Tel: 602-935-1100

Substance of the Case: This was an action among four brothers and sisters and their families for partition of dozens of inherited real estate properties of substantial value, which were held as tenants in common by the four siblings and their numerous children. Other claims and counterclaims were asserted as well. The parties were aligned between three of the siblings and their children, whom I represented, and the other brother and his children, whom Mr. Schlosser represented. The case was extremely difficult because of the extent and the complexity of the properties and because of the feelings among some of the family members.

Significance of the Case: After a period of substantial litigation, in which I prevailed in all contested matters, we persuaded the opposing parties to mediate before Brice E. Buehler, 340 E. Palm Lane, Phoenix, AZ 85004 (602-253-4400). After more than a year and many mediation sessions, the matter was settled fairly and even with some steps toward reconciliation. This matter called for exceptional creativity, patience, and negotiating skills to reach a fair settlement which ended the litigation. Resolution of this dispute was of financial and personal benefit to all the families involved.

2. Structuring and drafting town ordinances for the Town of Paradise Valley, AZ.

Date: Early 1990's.

Substance of the work. The Town of Paradise Valley has no fire department. It had been interested in requiring by ordinance all property owners in the Town to subscribe to a private fire protection service. The parties in interest were the principal private fire service provider, the Town government, and private citizens of different views on the subject. Challenges included respecting the boundaries between governmental and private activities, protecting consumers required to contract for private services, and achieving

an effective mechanism to assure payment consistent with several principles of state property law, constitutional law, and municipal law. After previous efforts to devise an acceptable ordinance had languished, the Town engaged me to coordinate with the parties in interest, to determine the legal boundaries of the Town's courses of action, and to draft an appropriate ordinance. I did so, resulting in an enacted ordinance that has worked well and without legal challenge.

3. As is outlined in answers to other questions, my legal activities have included extensive involvement in bar activities in the public interest. For 16 or 17 of the last 21 years I have been a member of the State Bar Committee on Civil Practice and Procedure, which reviews all proposed changes in civil rules and makes recommendations to the State Bar Board of Governors and the Arizona Supreme Court. The Arizona Rules closely follow the Federal Rules of Civil Procedure, and our Committee also monitors and comments on proposed changes in the federal rules. For 24 years I have authored portions of a State Bar publication on Arizona administrate law and judicial review of government action. I have also monitored developments in federal administrative law in connection with that authorship and with my federal court practice. I was a founding member and am now the Chair of the State Bar Appellate Practice Section, which is actively involved in appellate practice education and bench-bar relations. I have been actively involved for ten years in the American Academy of Appellate Lawyers, a national society of about 260 appellate lawyers selected solely upon recommendation of other leading appellate lawyers. In the past I have served as a member of the editorial board of the State Bar's monthly publication for members, Arizona Attorney, and as a member of the Board of Directors of Community Legal Services, the legal services provider for the majority of the population of Arizona.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe arrangements you have made to be compensated in the future for any financial or business interest.

I may have accounts receivable unpaid when I close my current law practice (Law Offices of Neil Vincent Wake). I do not know whether all accounts receivable will be paid before I terminate my law practice or whether some will remain unpaid at that time.

I may have an attorney fee interest in one or two contingent fee litigation matters in which I have been involved but which other attorneys will prosecute. The extent, if any, of my contingent fee interests will be fixed by agreement before the actions are filed and in any event while I am still engaged in law practice.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

The only possible future payments for past professional services are the categories described in the foregoing answer. If it should become necessary for me to engage in collection procedures for unpaid accounts receivable after terminating my law practice, which I do not expect to happen, I would do so through retained counsel. For other matters of potential conflict of interest, I would follow the standards of 28 USC 455 with the guidance and advice available through the Administrative Office of the Courts.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items

exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

The Financial Disclosure Report is attached.

5. Please complete the attached financial net worth statement in detail. (Add schedules as called for).

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in **--10,000**				Notes payable to banks-secured	0		
U.S. Government securities-add schedule	0			Notes payable to banks-unsecured	0		
Listed securities-add schedule— **2,572,235**				Notes payable to relatives	0		
Unlisted securities--add schedule -- **361,000**				Notes payable to others	0		
Accounts and notes receivable:	0			Accounts and bills due	0		
Due from relatives and friends	0			Unpaid income tax	0		
Due from others	0			Other unpaid income and interest	0		
Doubtful	0			Real estate mortgages payable-add schedule	0		
Real estate owned-add schedule **--550,000**				Chattel mortgages and other liens payable	0		
Real estate mortgages receivable	0			Other debts-itemize:	0		
Autos and other personal property **40,000**							

Cash value-life insurance	0						
Other assets itemize:							
--Law firms (book value) **--$49,000**							
				Total liabilities	0		
				Net Worth---**3,582,235**			
Total Assets **--3,582,235**				Total liabilities & net worth **3,582,235**			
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor **160,000—guarantor to brother**	0			Are any assets pledged? (Add schedule) **No.**			
On leases or contracts (office lease) **28,000**				Are you defendant in any suits or legal actions? **No.**			
Legal Claims	0			Have you ever taken bankruptcy? **No.**			
Provision for Federal Income Tax	0						
Other special debt	0						

LISTED SECURITIES

Account Name	$ Value
Manulife Financial Corp.	23,386.09
Morgan Stanley Growth Fund B	6,979.43
Morgan Stanley Global Dividend Grwth Sec B	5,326.90
Morgan Stanley New Discoveries Fund C	4,570.00
Morgan Stanley Capital Opportunities TR B	4,086.92
Morgan Stanley Japan Fund B	1,109.78
Morgan Stanley Dividend Grwth Securities B	7,549.30
Amgen Inc	1,252.86
Analog Devices Inc	1,044.60
Applied Materials Inc	2,217.60

Avon Products Inc	1,430.60
Bank of America Corp	869.33
Becton Dickinson & Co	971.25
Bed Bath & Beyond Inc	970.50
Bellsouth Corp	2,263.55
Best Buy Co	1,976.40
Charles Schwab New	1,715.30
Clear Channel Communication	1,483.65
Costco Wholesale Corp New	1,464.00
Dell Computer Corp	1,751.20
EMC Corp Mass	1,204.05
Gannett Company Inc DE	768.10
Gilead Science	1,944.25
Ill Tool Works Inc	1,975.50
Intuit Inc	981.20
Marsh & Mclennan Cos Inc	1,532.10
Maxim Integrated Products Inc	852.50
Medtronic Inc	959.40
Microsoft Corp	1,794.80
Northern Trust Corp	1,248.00
Novellus System	1,832.50
Omnicom Group	1,075.50
Oracle Corp	840.70
Robert Half Int	511.38
Southwest Airlines	1,204.00
Starbucks Corp Washington	1,350.25
Starwood Htls & Rsts WW Inc	857.70
Sungard Data Systems Inc	1,165.95
United Parcel Service Inc CL-B	1,592.50
Unitedhealth Gp Inc	1,507.50
Univision Comm Inc Class A	1,064.00
Veritas Software DE	1,296.90
Walgreen Co	903.00
Wells Fargo & Co New	1,360.80
XILINX Inc	1,012.00
Morgan Stanley New Discoveries Fund A	4,455.36
Liquid Asset Fund	5,142.49
Morgan Stanley Global Dividend Grwth Sec B	4,957.28
Morgan Stanley Pacific Growth Fund B	1,504.03
Templeton Global Sm Co Gr Fd A	14,515.72
Liquid Asset Fund	1,511.39

Analog Devices Inc	1,253.52
Applied Materials Inc	1,108.80
Bank of America Corp	1,580.60
Bed Bath & Beyond Inc	1,086.96
Best Buy Co	1,625.04
Boston Scientific Corp	1,833.00
Cardinal Health Inc	1,543.20
CISCO Sys Inc	1,695.79
Dell Computer Corp	1,178.08
Fedex Corp	1,116.54
Fleetboston Financial Cp	1,247.82
Gilead Science	1,333.20
Hewlett Packard	1,874.40
Honeywell International Inc	1,503.60
Interactivecorp	1,101.24
KLA Tencor Corp	1,393.80
Lowes Companies Inc.	1,245.55
Merrill Lynch & Co Inc	2,147.28
Microsoft Corp	2,205.04
Morgan Stanley	1,795.50
Nokia Cp Adr	1,199.39
Pfizer Inc	1,912.40
Qualcomm Inc	1,114.14
Teva Pharmaceuticals Adr	1,422.50
Texas Instruments	1,126.40
Tyco International Ltd New	2,182.70
Viacom Inc B	1,833.72
3M Company	1,418.78
Liquid Asset Fund	1,982.86
Putnam Voyager A	5,058.43
Liquid Asset Fund	8,686.17
Morgan Stanley Information Fund B	2,377.41
Morgan Stanley European Growth Fund B	3,819.00
Van Kampen Technology C	378.99
Putnam Voyager A	6,971.04
Tax-Mgd Large Cap Fund	183,158.40
Intel Corp	77,193.00
CISCO Sys Inc	21,054.00
Medtronic Inc	14,874.00
Altera Corp	13,494.00
Automatic Data Processing Inc	11,973.00

XILINX Inc	11,580.00
Rf Micro Devices Inc	11,479.00
Small Cap Value Fund	9,206.07
Small Cap Growth Fund	9,149.93
General Elec Co	8,871.00
Verizon Communications	4,309.04
Sun Microsystems Inc	3,120.00
Microsoft Corp	2,652.00
WorldCom Inc - WorldCom Group	6.10
WorldCom Inc - Mci Group	.69
Tax-Free Fund	325,535.30
Intermediate-Term Municipal Fund	116,415.19
International Fixed Income Fund	30,496.36
High Yield Bond Fund	20,873.69
Emerging Markets Debt Fund	18,732.80
International Equity Fund	58,728.77
Emerging Markets Equity Fund	31,811.06
Tax-Mgd Large Cap Fund	47,798.51
General Electric Co	21,290.40
Medtronic Inc	3,966.40
Small Cap Growth Fund	3,033.85
Small Cap Value Fund	2,964.91
Microsoft Corp	2,121.60
Intermediate-Term Municipal Fund	25,051.88
International Fixed Income Fund	6,800.13
High Yield Bond Fund	5,610.63
Emerging Markets Debt Fund	4,657.82
International Equity Fund	15,330.70
Emerging Markets Equity Fund	8,008.85
Nortel Networks Corp New	3,240.00
Tax-Free Fund	924.72
Large Cap Growth Fund	191,839.83
Large Cap Value Fund	178,843.57
Small Cap Value Fund	23,964.75
Small Cap Growth Fund	21,045.41
Medtronic Inc	19,832.00
Microsoft Corp	5,304.00
Verizon Communications	4,309.04
Enron Corp	20.40
WorldCom Inc - WorldCom Group	8.18
WorldCom Inc - Mci Group	1.04

International Equity Fund	110,797.07
Emerging Markets Equity Fund	65,993.68
Core Fixed Income Fund	75,454.27
International Fixed Income	23,419.74
High Yield Bond Fund	18,210.70
Emerging Markets Debt Fund	16,745.42
Prime Obligation Fund	5,416.45
Tax-Mgd Large Cap Fund	34,933.70
Small Cap Value Fund	1,974.17
Small Cap Growth Fund	1,660.10
Intermediate-Term Municipal Fund	18,191.32
International Fixed Income Fund	5,670.59
Emerging Markets Debt Fund	4,335.24
High Yield Bond Fund	3,949.40
International Equity Fund	8,724.28
Emerging Markets Equity Fund	5,274.31
Tax-Free Fund	267.02
Engemann Cap Growth	25,090.94
Seneca Strg Theme	11,336.41
MFS InvesGrowthStock	12,042.37
AlgerAmerLvgAllCap	13,147.96
Bernstein Mid-Cap	19,391.83
Seneca MidCap Growth	11,597.05
Tech Portfolio	9,398.46
WangerUS Smaller Cos	8,500.55
Aberdeen Int'l	14,016.06
Wanger Intl SmallCap	7,476.97
Guaranteed Interest	20,948.10
Manulife Lifestyle Growth	86,605.79
Oakhurst Allocation	11,845.04
WangerUS Smaller Cos	14,973.90
Wanger Intl SmallCap	8,490.35
AllBernEnhancedIndex	17,055.85
Oakhurst Growth&Inc	18,335.73
MFS InvesGrowthStock	12,643.56
Tech Portfolio	2,945.73
Liquid Assets	5,000.00
Manulife Ins	21,000.00
SM&R Algar Agg 6F CL-B	32,000.00
TOTAL	$2,572,235.13

UNLISTED SECURITIES

Apache Peak Inv. LLC	200,000
Cowley-BGWM LLC	60,000
Interstate Ventures V Ltd Ptshp	100,000
Winthrop Residential Assets II	1,000
Total	361,000

REAL ESTATE OWNED

House	500,000
Mohave County land	10,000
Tonopah land (undivided interest)	30,000
Pinal County Land (undivided interest	10,000
Total	550,000

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No. I have provided legal representation to some initiative campaigns, including litigation.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have done extensive uncompensated work over the 29 years of my practice in representation of disadvantaged persons, public interest litigation, representation of public service organizations and charities, and Bar activities in the public interest. I do not have records of the time expended on such activities.

I. In recent years I have represented indigent persons upon appointment of the District Courts of the Navajo Nation in the following matters, in which identity of clients is not stated:

--Defense of mother in dependency proceedings (to remove children from her custody) in 2003. I and me employees expended approximately 40 hours expended.

--Defense of father in dependency proceedings (to remove children from his custody) in 2002. I and my employees expended approximately 50 hours expended by my and my employees.

--Defense of driving under the influence charge in about 2001. I expended approximately 20 hours.

II. I recall the following significant matters going back further in time:

--I expended about 700 hours in uncompensated work in 1996-1998 in public interest litigation challenging the legality of the slot machine casino industry in Arizona. The intended beneficiaries of that work were the estimated 100,000 persons and families in Arizona suffering major pathological gambling behavior at those slot machine casinos. Studies showed those persons are disproportionately poor and even more disproportionately minorities.

--In the mid-1990's I arranged for my firm to do corporate merger documentation for two social service charities.

--For a period of about ten years in the 1980s and 1990s I served as a Volunteer Counsel for members of the American Radio Relay League, a national club of amateur radio operators. As a volunteer counsel I consulted without initial fee with radio amateurs on legal matters, usually application of deed restrictions and land use regulations to their radio operations and antenna construction. I represented some radio amateurs in some litigation matters involving deed restrictions. I also lobbied three local cities concerning enactment or amendment of radio antenna restriction ordinances. I expended about 400 hours in uncompensated legal work on such matters.

--In the early 1980's I defended Sojourner Center, a shelter for abused women and children, in a breach of construction contract action. The Center was then a struggling organization, and if it lost the construction case, it would have been destroyed. I expended about 100 hours and prevailed in the action. Sojourner Center has since grown to be the largest private shelter for abused women and children in the country. My wife and I participated in the activities of Sojourner Center in its early years.

--My wife and I and four other parents founded ICU Care Parents in the mid-1980's, a support group for parents of critically ill newborns. We made arrangements for referrals and coordination with the three tertiary level hospitals in the Phoenix metropolitan area, and we obtained funding from the March of Dimes and other sources. ICU Care Parents was a self-renewing and self-sustaining group of parents. In the 1990's ICU Care Parents merged with Raising Special Kids, a support group for handicapped children and their parents. I expended hundreds of hours for ICU Care Parents, most of which was non-legal.

2. The American Bar Associations' Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates—through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership, what you have done to try to change these policies?

I have never been a member of any such organization.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from

beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Senator Jon Kyl recommended me to the White House. I was interviewed by staff at the Office of the Counsel to the President in June 2003. I have submitted extensive written information and have been investigated by the Federal Bureau of Investigation and the Office of Legal Policy of the Department of Justice. The President nominated me on October 22, 2003.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such a case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution.

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The proper role of the federal judiciary is grounded in the Constitution's separation of powers within the Federal Government and its division of powers between the Federal and State governments. The federal judiciary is constitutionally limited to deciding cases or controversies, which excludes abstract pronouncements not part of the rules of decision in actual disputes of a judicial character. As such, the courts are essentially passive institutions, limited to resolving private and public cases between parties for whom relief judicial in character may be granted or denied.

Our society is one of diverse and disputed political and social values. The choice among competing values to be preferred in the law is essentially the duty of the democratic branch, the Congress.

Where the Constitution itself has set a preferred value above the majority preferences of the times, then it is the duty of the courts to enforce those constitutional requirements.

Finally, lower courts, such as District Courts, must adhere to the fair meaning of the precedents of the higher courts to which they are subject.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year 2002

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Wake, Neil V	U.S. District Court, Arizona	10/24/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) U.S. District Judge - Nominee	5. Report Type (check appropriate type) (•) Nomination. Date 10/22/2003 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2002 to 9/30/2003
7. Chambers or Office Address 3030 N. 3rd Street, Suite 1220 Phoenix, AZ 85012	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Proprietor	Law Offices of Neil Vincent Wake
2.	Trustee	Trust # 1
3.	Trustee	Trust # 2
4.	Trustee	Trust # 3
5.		
6.	Chair	Appellate Practice Section, State Bar Association of Arizona
7.	Trustee	Law Offices of Neil Vincent Wake 401K Profit Sharing Plan
8.	Trustee	Law Offices of Neil Vincent Wake Money Purchase Plan

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☑ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.		

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.			
2.			
3.	2001--03	Shari M. Capra, P.C. (law practice)	
4.	10-24-03	Law Offices of Neil Vincent Wake (law practice)	352,857
5.	2002	Law Offices of Neil Vincent Wake (law practice)	821,001
6.	2001	Law Offices of Neil Vincent Wake (law practice)	678,318

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Wake, Neil V	10/24/2003

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 14

Name of Person Reporting	Date of Report
Wake, Neil V	10/24/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children See pp 34-37 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
Wells Fargo accounts	A	Interest	J	T					
Law Offices of Neil V. Wake		None	K	U					
Sheri M. Capra, P.C.		None	J	U					
Apache Peak Inv., LLC		None	M	U					
Cowley-BOWM LLC	D	Distribution	K	U					
Interstate Ventures V Ltd. Ptshp	C	Distribution	L	W					
Winthrop Residential Associates II (LP)	A	Distribution	J	W					
401(K) Plan									
--Manulife Lifestyle Growth Fund	D	Dividend	L	T					
Trust # 1 (trustee)									
--Merrill Lynch assets	A	Interest	J	T					
--Reimanschneider note	D	Interest	L	T					
--Bank of N Y Co. Inc. common stock (BK)	A	Dividend	J	T					
--Pfizer Inc Del PV (PFE)	A	Dividend	J	T					
Trust # 2 (trustee)									
--Merrill Lynch assets	A	Interest	K	T					
--Reimanschneider note	D	Interest	L	T					

Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000		
Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000			
Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash Market		
	U = Book Value	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Wake, Neil V	10/24/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-37 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
18. --Bank of NY Co. Inc common stock (BK)	A	Dividend	J	T					
19. --Pfizer Inc. Del PV (PFE)	A	Dividend	J	T					
20. Trust # 3 (trustee)									
21. --Gary &Eliz Loveness note		None	L	T					
22. --Manulife Ins. whole life ins		None	L	T					
23. Brokerage Acct # 1									
24. Liquid Asset Fund (MM)	A	Dividend	J	T					
25. --Manulife Financial Corp. common stock	A	Dividend	K	T					
26. --MS Growth Fund B	A	Dividend	J	T					
27. --MS Global Dividend Grwth Sec B	A	Dividend	J	T					
28. --MS New Discoveries Fund C	A	Dividend	J	T					
29. --MS Capital Opportunities TR B		None	J	T					
30. --MS Japan Fund B		None	J	T					
31. Brokerage Acct # 2									
32. --Amgen Inc common stock	A	Dividend	J	T					
33. --Analog Devices Inc common stock	A	Dividend	J	T					
34. --Applied Materials Inc common stock	A	Dividend	J	T					
35. --Avon Products Inc common stock	A	Dividend	J	T					

1. Income Gain Codes: A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000
(See Columns B1 and D4) F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000
(See Columns C1 and D3) N = $250,001-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000
P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000
3. Value Method Codes: Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market
(See Column C2) U = Book Value; V = Other; W = Estimated

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Wake, Neil V	10/24/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
36. --Bank of America Corp common stock	A	Dividend	J	T					
37. --Becton Dickinson & Co common stock	A	Dividend	J	T					
38. --Bed Bath & Beyond Inc common stock	A	Dividend	J	T					
39. --Bell South Corp common stock	A	Dividend	J	T					
40. --Best Buy Co common stock	A	Dividend	J	T					
41. --Charles Schwab New common stock	A	Distribution	J	T					
42. Clear Channel Communication common stock	A	Dividend	J	T					
43. --Costco Wholesale Corp New common stock	A	Dividend	J	T					
44. --Dell Inc common stock	A	Dividend	J	T					
45. --EMC Corp Mass common stock	A	Dividend	J	T					
46. --Gannett Co Inc DE common stock	A	Dividend	J	T					
47. --Gilead Science common stock	A	Dividend	J	T					
48. --Ill Too Works Inc common stock	A	Dividend	J	T					
49. --Intuit Inc common stock	A	Dividend	J	T					
50. --Marsh & McLennan Cos Inc common stock	A	Dividend	J	T					
51. --Maxim Integrated Products Inc common stock	A	Dividend	J	T					
52. --Medtronic Inc common stock	A	Dividend	J	T					
53. --Microsoft Corp common stock		None	J	T					

1. Income Gain Codes (See Columns B1 and D4): A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes. (See Columns C1 and D3): J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000
3. Value Method Codes (See Column C2): Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets). Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
54. --Northern Trust Corp common stock	A	Dividend	J	T					
55. --Novellus System common stock	A	Dividend	J	T					
56. --Omnicom Group common stock	A	Dividend	J	T					
57. --Oracle Corp common stock	A	Dividend	J	T					
58. --Robert Half Int common stock	A	Dividend	J	S					
59. --Sabre Holdings CP common stock	A	Dividend	J	T					
60. Southwest Airlines common stock	A	Dividend	J	T					
61. --Starbucks Corp Washington common stock	A	Dividend	J	T					
62. --Starwood Htls & Rsts WW Inc common stock	A	Dividend	J	T					
63. --Sungard Data Systems Inc common stock	A	Dividend	J	T					
64. --United Parcel Service Inc CL-B common stock	A	Dividend	J	T					
65. --Unitedhealth Gp Inc common stock	A	Dividend	J	T					
66. --Univision Omm Inc Class A common stock	A	Dividend	J	T					
67. --Veritas Software DE		None	J	T					
68. --Walgreen Co common stock	A	Dividend	J	T					
69. --Wells Fargo & Co New common stock	A	Dividend	J	T					
70. --Xilinx Inc common stock	A	Dividend	J	T					
71. --Electronic Arts Inc common stock	A	Dividend							

1. Income/Gain Codes (See Columns B1 and D4): A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000; I = $50,001-$100,000; J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
2. Value Codes (See Columns C1 and D3): Q = Appraised; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place 'X' after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer seller (if private transaction)
72. --Emerson Electric Co common stock	A	Dividend							
73. --Pepsico Inc common stock	A	Dividend							
74. --Johnson and Johnson common stock	A	Dividend							
75. --Automatic Data Processing Inc common stock	A	Dividend							
76. --Cisco Systems Inc common stock	A	Dividend							
77. --Citigroup Inc common stock	A	Dividend							
78. Intel Corp common stock	A	Dividend							
79. --Merk & Co common stock	A	Dividend							
80. --Pfizer Inc common stock	A	Dividend							
81. --Target Corp common stock	A	Dividend							
82. --Viacom Inc B common stock	A	Dividend							
83 --Schering Plough Corp common stock	A	Dividend							
84 --State Street Corp common stock	A	Dividend							
85. --Walt Disney Co Hldg Co common stock	A	Dividend							
86. IRA # 1									
87. --New Discoveries Fund A (Mut Fd)	A	Dividend	J	T					
88. IRA # 2									
89. --Liquid Asset Fund (MM)	A	Dividend	J	T					

1. Income Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes. (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = SMore than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash Market	
	U = Book Value	V = Other	W = Estimated		

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 1 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
90. --Analog Devices Inc common stock	A	Dividend	J	T					
91. --Applied Materials Inc common stock	A	Dividend	J	T					
92. --Bank of America Corp common stock	A	Dividend	J	T					
93. --Bed Bath & Beyond Inc common stock	A	Dividend	J	T					
94. --Best Buy Co common stock	A	Dividend	J	T					
95. --Boston Scientific Corp common stock	A	Dividend	J	T					
96. --Cisco Systems Inc common stock	A	Dividend	J	S					
97. --Dell Inc common stock	A	Dividend	J	T					
98. --Fedex Corp	A	Dividend	J	T					
99. --Fleetboston Financial Cp common stock	A	Dividend	J	T					
100. --Gilead Science	A	Dividend	J	T					
101. --Hewlett Packard	A	Dividend	J	T					
102. --Honeywell International Inc common stock	A	Dividend	J	T					
103. --Interactive Corp common stock	A	Dividend	J	T					
104. --KLA Tenor Corp common stock	A	Dividend	J	T					
105. --Lowes Companies Inc common stock	A	Dividend	J	T					
106. --Merrill Lynch & Co. Inc common stock	A	Dividend	J	T					
107. --Microsoft Corp common stock		None	J	T					

1. Income Gain Codes: (See Columns B1 and D4)
A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000

2. Value Codes: (See Columns C1 and D3)
J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,001-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000

3. Value Method Codes: (See Column C2)
Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. Income during reporting period (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. Gross value at end of reporting period (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	D. If not exempt from disclosure (3) Value Code 2 (J-P)	D. If not exempt from disclosure (4) Gain Code 1 (A-H)	D. If not exempt from disclosure (5) Identity of buyer-seller (if private transaction)
108. --Morgan Stanley common stock	A	Dividend	J	T					
109. --Nokia CP ADR common stock	A	Dividend	J	T					
110. --Pfizer Inc common stock	A	Dividend	J	T					
111. --Qualcomm Inc common stock	A	Dividend	J	T					
112. --Teva Pharmaceuticals ADR common stock	A	Dividend	J	T					
113. --Texas Instruments common stock	A	Dividend	J	T					
114. Tyco International Ltd New common stock	A	Dividend	J	T					
15. --Viacom Inc B common stock	A	Dividend	J	T					
16. --Wellpoint Hlth Net Inc New common stock	A	Dividend	J	T					
17. --3M Company common stock	A	Dividend	J	T					
18. --Cardinal Health Inc common stock	A	Dividend							
19. --Amgen Inc common stock	A	Dividend							
20. --First Data Corp common stock	A	Dividend							
21. --Proctor & Gamble common stock	A	Dividend							
12. --Johnson & Johnson common stock	A	Dividend							
13. --Pepsico Inc common stock	A	Dividend							
4. --Costco Wholesale Corp New common stock	A	Dividend							
5. --Citigroup Inc common stock	A	Dividend							

Income Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000		
Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash Market	
	U = Book Value	V = Other	W = Estimated		

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place 'X' after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer-seller (if private transaction)
126. --Coca Cola Co common stock	A	Dividend							
127. --Electronic Data Systems Corp common stock	A	Dividend							
128. --General Electric Co common stock	A	Dividend							
129. --General Motors Corp common stock	A	Dividend							
130. --General Dynamics Corp common stock	A	Dividend							
131. --Gillette Co common stock	A	Dividend							
132. Pfizer Inc	A	Dividend							
133. --Veritas Software DF	A	Dividend							
134. --American International GP common stock	A	Dividend							
135. --AOL Time Warner common stock	A	Dividend							
136. --Baxter Intl Inc common stock	A	Dividend							
137. --Cardinal Health Inc common stock	A	Dividend							
138. --Celestica Inc Sub VTG SHS common stock	A	Dividend							
139. --Costco Wholesale Corp New common stock	A	Dividend							
140. --Dell Computer Corp common stock	A	Dividend							
141. --Oracle Corp common stock	A	Dividend							
142. --Worldcom Inc common stock	A	Dividend							
143. IRA # 3									

1. Income Gain Codes: (See Columns B1 and D4) A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: (See Columns C1 and D3) J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes (See Column C2): Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
144. --Liquid Asset Fund (MM)	A	Dividend	J	T					
145. --MS Global Dividend Grwth Sec B (Mut Fd)	A	Dividend	J	T					
146. --MS Pacific Growth Fund B (Mut Fd)	A	Dividend	J	T					
147. --Templeton Global SM Co Gr Fd A (Mut Fd)	A	Dividend	J	T					
148. UTMA Acct # 1									
149. --Liquid Asset Fund (MM)	A	Dividend							
150. Putnam Voyager A (Mut Fd)	A	Dividend							
151. UTMA Acct # 2									
152. --Liquid Asset Fund (MM)	A	Dividend	J	T					
153. --Putnam Voyager A (Mut Fd)	A	Dividend	J	T					
154. UTMA Acct # 3									
155. --Liquid Asset Fund (MM)	A	Dividend	J	T					
156. --MS Information Fund B (Mut Fd)	A	Dividend	J	T					
157. --MS European Growth Fund B (Mut Fd)	A	Dividend	J	T					
158. --Putnam Voyager A (Mut Fd)	A	Dividend	J	T					
159. Brokerage Acct # 3									
160. --SEI Tax-Free Fund (MM)	D	Dividend	N	T					
161. --SEI Tax-Mgd Large Cap Fund (MM)	B	Dividend	M	T					

1. Income Gain Codes. (See Columns B1 and D4) A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes. (See Columns C1 and D3) J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000
3. Value Method Codes (See Column C2) Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
162. --Intel Corp common stock	A	Dividend	L	T					
163. --Cisco Systems Inc common stock		None	K	T					
164 --Medtronic Inc common stock	A	Distribution	J	T					
165. --Altera Corp common stock		None	J	T					
166. --Automatic Data Processing Inc common stock	A	Dividend	J	T					
167. --XILINC Inc common stock		None	J	T					
168. RF Micro Devices Inc		None	J	T					
169. --Small Cap Value Fund (Mut Fd)	A	Dividend	J	T					
70. --SEI Small Cap Growth Fund (Mut Fd)	A	Dividend	J	T					
71. --General Electric Co common stock	A	Dividend	J	T					
72. --Verizon Communications common stock	A	Dividend	J	T					
73 --Sun Microsystems Inc common stock	A	Dividend	J	T					
74. --Microsoft Corp common stock		None	J	T					
75. --SEI Intermediate-Term Municipal Fund (Mut Fd)	C	Dividend	M	T					
76. --SEI International Fixed Income Fund (Mut Fd)	A	Dividend	K	T					
77. --SEI High Yield Bond Fund (Mut Fd)	B	Dividend	K	T					
78. --SEI Emerging Markets Debt Fund (Mut Fd)	B	Dividend	J	T					
79. --SEI International Equity Fund (Mut Fd)	B	Dividend	K	T					

Income Gain Codes. (See Columns B1 and D4): A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000

Value Codes. (See Columns C1 and D3): J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,001-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000

Value Method Codes (See Column C2): Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

	A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
180.	Brokerage Acct # 4									
181.	--SEI Tax-Mgd Large Cap Fund (Mut Fd)	A	Dividend	K	T					
182.	--SEI Small Cap Value Fund (Mut Fd)	A	Dividend	J	T					
183.	--SEI Small Cap Growth Fund (Mut Fd)	A	Dividend	J	T					
184.	--SEI Intermediate-Term Municipal Fund (Mut Fd)	A	Dividend	J	T					
185.	--SEI International Fixed Income Fund (Mut Fd)	A	Distribution	J	T					
186.	SEI Emerging Markets Debt Fund (Mut Fd)	A	Dividend	J	T					
187.	--SEI High Yield Bond Fund (Mut Fd)	A	Dividend	J	T					
188.	--SEI International Equity Fund (Mut Fd)	A	Dividend	J	T					
189.	--SEI Emerging Markets Equity Fund (Mut Fd)	A	Dividend	J	T					
190.	Brokerage Acct # 5									
191.	--SEI Large Cap Growth Fund (Mut Fd)	B	Dividend	M	T					
192.	--SEI Large Cap Value Fund (Mut Fd)	B	Dividend	M	T					
193.	--SEI Small Cap Value Fund (Mut Fd)	A	Dividend	K	T					
194.	--SEI Small Cap Growth Fund (Mut Fd)		Dividend	K	T					
195.	--Medtronic Inc common stock	A	Dividend	K	T					
196.	--Microsoft Corp common stock		None	J	T					
197.	--Verizon Communications common stock	A	Dividend	J	T					

1. Income Gain Codes: (See Columns B1 and D4) A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes (See Columns C1 and D3) I = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000
3. Value Method Codes (See Column C2) Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
198. --SEI International Equity Fund (Mut Fd)	B	Dividend	M	T					
199. --SEI Emerging Markets Equity Fund (Mut Fd)	B	Dividend	J	T					
200. --SEI Core Fixed Incom Fund (Mut Fd)	C	Dividend	L	T					
201. --SEI International Fixed Income Fund (Mut Fd)	B	Dividend	K	T					
202. --SEI High Yield Bond Fund (Mut Fd)	B	Dividend	K	T					
203. --SEI Emerging Markets Debt Fund (Mut Fd)	A	Dividend	K	T					
204. SEI Prime Obligation Fund (Mut Fd)	A	Dividend	J	T					
205. Trust # 4 (beneficiaries)									
206. --SEI Tax-Mgd Large Cap Fund (Mut Fd)	B	Dividend	K	T					
207. --General Electric Co common stock	A	Dividend	K	T					
208. --Medtronic Inc common stock	A	Dividend	J	T					
209 --SEI Small Cap Growth Fund (Mut Fd)	A	Dividend	J	T					
210. --SEI Small Cap Value Fund (Mut Fd)	A	Distribution	J	T					
211. --Microsoft Corp common stock		None	J	T					
212. --SEI Intermediate-Term Municipal Fund (Mut Fd)	A	Dividend	K	T					
213. --SEI International Fixed Income Fund (Mut Fd)	A	Dividend	J	T					
214 --SEI High Yield Bond Fund (Mut Fd)	A	Dividend	J	T					
215. --SEI Emerging Markets Debt Fund (Mut Fd)	A	Dividend	J	T					

1. Income Gain Codes (See Columns B1 and D4): A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes. (See Columns C1 and D3): J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,001; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes (See Column C2): Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place 'EX' after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
216. --SEI International Equity Fund (Mut Fd)	A	Dividend	K	T					
217. --SEI Emerging Markets Equity Fund (Mut Fd)	A	Dividend	J	T					
218. --Nortel Networks Corp New common stock		None	J	T					
219. --SEI Tax-Free Fund (Mut Fd)	A	Dividend	J	T					
220. Maricopa County land		None	K	W					
221. Pinal County land		None	J	W					
222. Mohave County land		None	J	W					
223. Roth IRA # 4									
224. --Liquid Asset Fund (Mut Fd)	A	Dividend	J	T					
225. Manulife Financial Life Ins	A	Dividend	K	T					
226. Section 529 Account									
227. --SM & R Alger Aggressive GF CL-B (Mut Fd)		None	K	T					
228. IRA # 5--									
229. --Engemann Cap Growth (Mut Fd)		None	K	T					
230. --Seneca Strg Theme (Mut Fd)		None	J	T					
231. --MFS InvsGrowthStock (Mut Fd)		None	J	T					
232. --AlgerAmerLrgAllCap (Mut Fd)		None	J	T					
233. --Bernstein Mid-Cap (Mut Fd)		None	J	T					

Income Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000			
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Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000				
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Name of Person Reporting	Date of Report
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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp 34-57 of filing instructions.)

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234. --Seneca MidCap Growth (Mut Fd)		None	K	T					
235. --Tech Portfolio (Mut Fd)		None	J	T					
236. --WangerUS Smaller Cos (Mut Fd)		None	J	T					
237. --Aberdeen Int'l (Mut Fd)		None	K	T					
238. --Wanger Intl SmallCap (Mut Fd)		None	J	T					
239. --Phoenix Wealth Mngmt	B	Interest	K	T					
240. Phoenix Universal Variable Life Ins									
241. --Oakhurst Allocation (Mut Fd)	A	Dividend	J	T					
242. --WangerUS Smaller Cos (Mut Fd)	A	Dividend	J	T					
243. --Wanger Intl SmallCap (Mut Fd)	A	Dividend	K	T					
244. --AllBernEnhancedIndex (Mut Fd)	A	Dividend	K	T					
245. --Oakhurst Growth&Inc (Mut Fd)	A	Dividend	K	T					
246. --MFS InvesGrowthStock	A	Dividend	J	T					
247. --Tech Portfolio	A	Dividend	J	T					

1. Income Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000				
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FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
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VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

I. Positions: I am the trustee and the sole beneficiary of the Law Offices of Neil Vincent Wake Money Purchase Plan, which holds retirement funds rolled over from the plans of previous law firms.
I am the trustee of the Law Offices of Neil Vincent Wake 401K Pension Plan, of which I and three current or former employees are beneficiaries. Each beneficiary's interest in the Plan is fully vested, and each beneficiary self-directs their own investments. Section VII lists only the assets in this Plan of which I am the beneficiary and which I direct. Upon termination of my law practice, the Law Offices of Neil Vincent Wake 401K Pension Plan will be terminated and each beneficiary's account roled over into an IRA or other account of the beneficiary's choice.
VII. Investments and Trusts. Where records of possible dividend income on formerly held stocks and mutual funds are unclear, possible dividend income has been indicated and may be unintentionally overreported.

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IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Neil Vincent Wake Date October 24, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

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One Columbus Circle, N.E.
Washington, D.C. 20544

Senator KYL. Now, before we begin questioning, I note the presence of Senator Durbin of Illinois. And, Senator Durbin, if you have any statement to make, you are certainly welcome to do so.

Senator DURBIN. No, Mr. Chairman. I will waive an opening statement.

Senator KYL. Thank you very much.

Well, then, the floor is open for questions, and I will begin by calling on Senator Craig.

Senator CRAIG. Thank you very much, Mr. Chairman. Let me ask this question of all of you, and you can, obviously, we will start over here with you and move across.

If the Supreme Court reached a decision that you believe was fundamentally erroneous, would you follow that precedent or apply your own judgment to the issues of the law placed before you?

Mr. GRUENDER. Senator, thank you for the question.

The answer to that is crystal clear. Despite any beliefs that I might have, I would be required, as an inferior court judge, to apply the precedent of the Supreme Court, and I would in fact do so.

Judge MARTINEZ. Thank you, Senator.

As a judge now for the last 14.5 years or so, I have always done exactly that. My own personal beliefs play no part in how I apply the law that has been decided by the superior courts.

Ms. PRATTER. Senator, if I am fortunate enough to be confirmed, it would be my obligation, and an obligation I would follow, to follow the Supreme Court precedent.

Mr. WAKE. Senator, thank you for the question.

It is essential to the system that lower court judges following the controlling authority from higher courts. So, of course, if I were confirmed as a judge, I would follow the letter and the spirit of the precedents that are laid down, regardless of my own views.

Senator CRAIG. Well, thank you all. There are some on this Committee who struggle with the idea that you must give the exact, correct answer to their philosophy or attitude on a given issue to be, by their decision, a judge. I do not approach reviewing nominees that way and never have. I have always felt what is important is the intellect, the experience and the temperament.

So let me ask one more question of all of you. What do you think is the most important attribute of a judge?

Mr. GRUENDER. Senator, I believe there are several attributes that are very important. I think a level of academic ability and integrity are very important, a broad exposure to the law and an understanding of the law and, probably even more importantly, a willingness to do the hard work that is required to understand the facts underlying a case and then to get a clear understanding of the applicable law and apply it, and then, in addition, demeanor, the willingness to come into it with an open mind, to listen to both sides, and to fairly and honestly assess and apply the law.

Senator CRAIG. Thank you.

Judge Martinez?

Judge MARTINEZ. Thank you, Senator.

It is very difficult for me to add anything to the list of attributes that he has just indicated. I would say that, in my experience, both as a litigator and as a judge, I have always believed, sir, that it

is absolutely critical that anyone who puts on a black robe understand how important their demeanor is. Courteousness is critical. You must listen. You must be patient, never embarrass anyone; that is, is the lawyers, the litigants, witnesses, jurors, court staff, anybody else in there. I have always tried to live my life exactly in that fashion. I can promise you I would do the very same thing in the future if I was lucky enough to be confirmed.

Ms. PRATTER. Thank you, Senator, for the opportunity to add to that fine list of attributes we have listened to so far, to which I would only add the importance, I believe, of the role of having a good sense of humility that a judge, I believe, should have.

Senator CRAIG. Thank you.

Mr. WAKE. Thank you, Senator.

I must accept and agree with everything that has been said by the others, and it is a little difficult to add to what has been said so well. Let me say only two things:

Obviously, there are a group of essential qualities, and the failure of any one of those qualities can diminish the quality of justice. If I were to point to one in particular, it would be patience and open-mindedness in one's work and private and in one's dealings with litigants and lawyers before the Court, and that patience and open-mindedness is what can leave people with the sense that whether they won or lost, they were treated fairly and that the system works, and that is very much within the control of the judge, more than anyone else.

Thank you.

Senator CRAIG. Well, I thank you all very much.

One last comment, and it is to you, Judge Martinez. To have a daughter at Washington State University is a bit of a frustration to me. I am a Vandal from the University of Idaho, eight miles away.

[Laughter.]

Senator CRAIG. Mr. Chairman, there is a tradition between those two schools that has frustrated me for some time, and as a result of that I just do not care for cougars.

[Laughter.]

Senator CRAIG. And that is that when those two universities played, the losing university student body president had to walk the eight miles and wash the feet of the victor. I have walked that eight miles.

[Laughter.]

Senator CRAIG. Good luck on your soccer program at Washington State.

Thank you, Mr. Chairman.

Senator KYL. Thank you, Senator Craig.

Senator Durbin?

Senator DURBIN. Thank you very much, Mr. Chairman, and thanks to all who have gathered here today.

Senator Craig has asked a number of questions which I think are very important, having been a lowly attorney practicing before Federal judges in my life, I like to, at least I hope that the plea for humility is one that is felt on that side of the table, as well as on this side of the table. I think it is very important in public service.

Mr. Gruender, I would like to ask you a few questions, if I can, about an incident which occurred after you were designated as the United States Attorney, involving a resolution passed by the University City, Missouri, City Council concerning the PATRIOT Act. You responded, if I am not mistaken, in an open letter critical of this City Council action. It is my understanding that about 200 communities in 34 different States have expressed their concern and take an exception to the PATRIOT Act. I have had conversations with my U.S. Attorney in Chicago, Pat Fitzgerald, about this act, and he has testified before this Committee.

But I am concerned about some of the rhetoric which was contained in your letter, and I would like you to explain it. You were quoted as saying in that letter that "resolutions that are grounded in misinformation, such as the one adopted by the University City Council, accomplish little to protect civil liberties and can jeopardize public safety." You went on to say, "The Council's action, which appears to have been made without the benefit of facts," has potentially grave consequences. And you wrote that the resolution put "lives in jeopardy, puts all citizens at risk and might cause a 'catastrophic' loss of life." These were your words.

We have really jealously guarded the right of dissent and disagreement in America. And even when popular Presidents have said and done things, we have said that it is the right of American citizens to disagree publicly with that policy.

Not that long ago Attorney General Ashcroft came and testified before this Committee relative to his critics, and basically said, and I quote from the Judiciary Committee testimony as follows. This is Attorney General Ashcroft. "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our National unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends. They encourage people of good will to remain silent in the face of evil."

The tenor of your letter, seems to me, to be very close to the message of General Ashcroft, which is that the critics of this Government, and the critics of the PATRIOT Act, are, in fact, aiding and abetting terrorism. Do you believe that?

Mr. GRUENDER. Senator, with respect to the University City resolution, I felt the need to respond to that, based on the fact that the University City Council never sought any input from any other sources, apparently—no one on behalf of the Government. My office, the U.S. Attorney's Office, was never contacted to provide information about the PATRIOT Act. The resolution, on its face, was based upon what I believe to be wrong statements about the PATRIOT Act that, as you know, was overwhelmingly passed.

I do not mean to suggest, by any means, that people are not allowed to criticize the Government or the PATRIOT Act or anything else. But as an example, the sort of statements that were made during that debate were that the Government now had the right to obtain a search warrant without judicial approval, which is simply untrue; that we had the right to or the ability to obtain wiretaps without court approval, again, simply not true.

It was based on those sort of statements that I thought needed to be corrected. And then the University City Council went the ad-

ditional step of telling its Police Department not to cooperate with Federal authorities, and they did qualify that by saying, if they thought that there were constitutional violations happening as a result. That troubled me because, clearly, the preamble, the sections above that were inaccurate about the PATRIOT Act would lead a police chief or a line officer, perhaps, to believe that we were violating constitutional rights, which simply was not true or that the PATRIOT Act, on its face, did that.

So I felt the need to correct that, and had the additional concern, as, Senator, I am sure you remember the hearings with respect to September 11th and the issues of connecting the dots, after September 11th the U.S. Attorneys, amongst others, were given the tremendous responsibility of preventing and disrupting terrorism. And I thought it was very important that we have a coordinated effort at all levels of law enforcement—State, local and Federal—work together to share information.

You may also know that a part of the letter that I wrote acknowledged the importance of civil rights and civil liberties and, indeed, I think I pointed out in that letter that, as Federal law enforcement officers, we were sworn to uphold and protect civil rights and civil liberties and, in fact, took that very seriously.

Senator DURBIN. Mr. Gruender, I could understand if your public comment was that the University City, City Council was wrong and did not understand the PATRIOT Act and misinterpreted it, but your language went a step beyond that and said that their action put lives in jeopardy. That, to me, suggests that you have gone beyond disagreeing with them.

Do you really believe that that City Council ordinance was in any way aiding or abetting terrorism, putting lives in jeopardy in Missouri or any other place?

Mr. GRUENDER. Senator, by no means do I mean to suggest that it purposefully was done with that purpose, absolutely not. However, I do think that if a police officer in University City obtained information about a potential cell that was operating in its jurisdiction, and for some reason hesitated to share that information with the FBI, with the Joint Terrorism Task Force, I think there are some potential dangers there, and I do believe that it could result in catastrophic, I mean, hopefully not along the lines of what we saw on September 11th, but I certainly do not want to be the U.S. Attorney in Eastern Missouri and have something like that happen in St. Louis, for instance.

Senator DURBIN. Would you feel that, if your nomination is approved to the Circuit Bench, that it would be appropriate for you to recuse yourself in cases involving interpretation of the PATRIOT Act?

Senator DURBIN. Senator, I do not think that I have reached any opinions or conclusions about the constitutionality of any particular provision of the PATRIOT Act. Of course, what I would do is look at the statute applicable. I believe it is 28 U.S.C. 455. I would also look at the Code of Judicial Ethics and see if there are any grounds upon which I should recuse myself, but as I sit here today, I do not think that there would be.

Senator DURBIN. Mr. Chairman, I do not want to go—I have a few other questions relative to the PATRIOT Act, but I want to cer-

tainly give other members or yourself a chance to question, and I can do it in a second round, if it would be appropriate.

Senator KYL. I appreciate that. We have tried to proceed here a little bit in variance with our traditional procedures, simply to give everybody a chance to introduce folks and move forward. I have just some general questions, and therefore I would be pleased if you want to just continue and not be concerned about the time constraints, at least at this point.

Senator DURBIN. Thank you. I do not want to abuse the Committee, and I thank you for your kindness in allowing me.

Mr. Gruender, let me go a little bit further then in these questions involving the PATRIOT Act. In a commentary submitted to the St. Louis Post Dispatch on February 14th last year, you asserted that the U.S. PATRIOT Act did not permit new, warrantless searches, seizures and wiretaps, and I think you have said as much this morning.

Further, you stated that "judicially issued independent determinations of probable cause remain the necessary legal standard."

Under Section 505 of the USA PATRIOT Act, national security letters, which are issued by FBI officials without a court order, can now be used to compel production of business records if the Court certifies they are "sought for a terrorism or national security investigation. Records demanded can include any record pertaining to the customer's relationship with the institution."

Now, before the PATRIOT Act, the FBI had to have reason to believe that the records being sought pertained to a suspected spy or terrorist. Further, under the fiscal year 2004 intelligence authorization bill, signed by the President, the list of entities to whom NSLs can be issued now include nearly all types of businesses.

In addition, under Section 215 of the PATRIOT Act, if the Federal Government seeks an order to obtain any tangible thing from any business, including book-borrowing records from a library, there is no evidentiary showing required. The judge shall, under the words of the PATRIOT Act, shall issue the order if the Government simply states that the records are sought for an authorized investigation

Further, the Government need not show that the person targeted by the order is himself or herself engaged in anything illegal.

Now, how do you reconcile this clear statement of the law, of the PATRIOT Act, with the statement that you made to the St. Louis Post Dispatch, in which you said, "Judicially issued independent determinations of probable cause remain the necessary legal standard"?

Mr. GRUENDER. Well, Senator, I believe I was referring to—and I do not have a copy of what I wrote back in February in front of me—but I believe what I was referring to were wiretaps, and it did not refer—oh, and search warrants—it did not refer to the issuance of national security letters.

However, from what you have just read, both require, I believe, judicial approval. And also, if I may, it has always been the case that in a criminal investigation, which generally are not opened unless the FBI or the U.S. Attorney's Office has reason to believe that a crime has been committed, that those sort of records were

obtainable, initially, without judicial review through the use of grand jury subpoenas.

Senator DURBIN. I put you at a disadvantage because you do not have your letter in front of you. And I want to be fair, and I am going to send you written questions so you can give me a full explanation. But I would suggest to you that our reading of the PATRIOT Act is the opposite of what you just said, that there is no Court approval necessary for national security letters. In fact, it is mandatory. It says, "The judge shall issue the order." And, frankly, I think that what you have just said is inconsistent with the language of the act, which has caused many, on both sides of the aisle here in the Senate and the House, to raise questions about whether we went too far with the PATRIOT Act.

I am not going to dwell on this, Mr. Chairman, because I do not want to put the witness at a disadvantage, having raised this line of questioning when he did not have a chance to review his letter beforehand. But if you would not mind, I would like to send you some specific questions.

I would like to ask all of the witnesses here about the concern expressed to me by Federal judges who have been in contact with me since action by Congress last year, and it relates to mandatory minimum sentences. There are many judges who believe that we have gone too far; that we have taken away the discretionary authority of judges to mete out sentences which they think are fair to individual criminal defendants, that we have created a formula for judges to impose sentences which is inconsistent with common sense and inconsistent with the goal of justice, in many instances.

One anecdotal case which I can relate to you is, in Pekin, Illinois, where we have a Federal correctional institution for women who have been convicted of felonies, I have visited this institution to find many middle-aged and elderly women who are knitting afghans in prison for 10 to 20 years because a drug-dealing boyfriend ratted them out in an effort to win favor with the prosecutor. And the judge, with no recourse, other than the mandatory minimum sentence, had to send many of these now older ladies to prison for lengthy periods of time.

I would like to have your response, and this will be my last question, Mr. Chairman, of each of the panel members about this concept of mandatory minimum sentences and the concern expressed by many Federal judges that Congress should re-examine whether we have gone too far.

Mr. Wake, would you like to start?

Mr. WAKE. Certainly, Senator. Thank you very much for the question.

Senator that certainly is a very important question and issue. In my practice, which I have been favored to have a wide-ranging civil litigation practice over the years, I have not had occasion to practice at all in the field of criminal law. Therefore, I lack the hands-on experience on how things really work to make refined judgments about that subject.

Now, I look forward, if I am confirmed, and if I am given the opportunity to serve as a judge, to learning that field of law, just as I have, over the years, learned other fields of law. And when that time comes, and if I should come to judgments that are considered

and worth sharing with the Congress, I think it would be appropriate for judges to do that. But at this moment, I am at a disadvantage from that lack of hands-on experience, and I would just give my commitment that, as in all things, I would study everything carefully and take advantage of my opportunity to share with the Congress my observations on the improvement of the justice system.

Senator DURBIN. Ms. Pratter?

Ms. PRATTER. Thank you, Senator.

Obviously, I am aware of the professional and popular subject, that this is a subject of some discussion and concern. Because my practice has been primarily in the civil area, I have not had the opportunity or need to work with the minimum sentencing legislation directly. It is something that I will have to learn about. I think that what you have described, in terms of your visit to the prison, is part of the legislative process that is so important, in terms of evaluating what is appropriate for our country, and that is where, at the legislative level, where I think, in the first instance, the citizens have to look.

In terms of the role of the judiciary in meting out and using the minimum sentencing legislation, it is very important for judges to commit to following the legislative pronouncements that they are presented with, and that is what I would do, if confirmed.

But beyond that, having no personal or professional information to add to your wealth of knowledge, there is nothing more I could really say at this time.

Senator DURBIN. Judge Martinez?

Judge MARTINEZ. Thank you, Senator.

Senator unlike my fellow nominees over here for the District Court, I have had years of experience with sentencing guidelines. I worked on the Sentencing Guideline Commission for the State of Washington as a judge.

I can tell you, from personal knowledge, that, in my opinion, sentencing is one of the most difficult things for any judge to engage in, no matter what the case, no matter who the individual is. It has always been, for me, one of the hardest aspects of my job.

I have lived under sentencing guidelines for most of my career. Washington State passed the Sentencing Reform Act in 1984, I believe, the same time the Federal guidelines went into effect. As a magistrate judge, one of the few cases that we are not allowed to handle are, of course, felony sentences. We cannot do that aspect of it, so I have not had very much experience with the Federal Sentencing Guidelines.

I think the concern you mentioned of Federal judges—and not just Federal judges, but also State judges—when it comes to the issue of mandatory minimums has merit. Many judges have raised that particular concern. And I believe, Senator, that it is always important to continue to review what is occurring, and I know there are many commissions, the United States Sentencing Commission, for example, and many committees that will not only gather information, but continually look and see if there is a better mechanism that we can use, if there are other things that we can do.

I can tell you this; that I think the vast majority of sentences fall within the range, within the guidelines, and it is those rare ones that stand out, but sometimes those are the ones that are the most troubling.

Senator DURBIN. Mr. Gruender?

Mr. GRUENDER. Like Judge Martinez, I have had some experience, as the U.S. Attorney, and want to note that I am here as a candidate for the Eighth Circuit Court of Appeals and not really as a representative of the Department of Justice.

It is certainly a matter of significant debate amongst many judges, and it is something that I believe is, without passing on the constitutionality of guidelines, which I think has been dealt with in the Mistretta case, or of mandatory minimums, I think that the definition of a crime, as well as the appropriate sentencing, has always been a function of Congress, not really of the judiciary.

That having been said, there are, in mandatory minimums, there are certainly provisions that do allow, in appropriate cases, for those to be gone around, the so-called relief values and cooperation-type matters. But, primarily, I would be reluctant to advise you, from this particular role. I think it is a matter that Congress should take up, not a judicial matter.

Senator DURBIN. Mr. Chairman, I would just add I think Mr. Gruender is correct. I think it is our responsibility, but I believe, in all honesty, that the passage of the Feeney amendment has restricted a lot of judges who, when they deviate from certain minimum mandatory sentences, have to make reports to the Department of Justice, so it creates more pressure for them not to make exceptions, where even they legally can. So that is our responsibility, and I thank the panel for their replies.

Senator KYL. Thank you, Senator Durbin.

I would just note one opportunity, though, that those reports afford is for the judge to explain why it is necessary to do this and perhaps better inform us to even possibly get us to change some of the laws. So it can have that salutary effect, too, I would just offer.

I have a different question to ask each of you, and one is somewhat along the lines that Senator Durbin asked Mr. Gruender.

You have been United States Attorney, and obviously you had a role to play there. You had to act as the Government's lawyer and to prosecute people when that was called for, and so on. And one of the questions I think is, obviously, that is very good experience for being a judge, but the other question is will that experience, in any way, detract from your ability to perform your functions properly? And I would just like to get your comment, generally, on how you view your experience as the Government's lawyer prior to now going on the bench, if you are confirmed.

Mr. GRUENDER. Thank you, Mr. Chairman. That is a very good question.

On the positive side, being the United States Attorney gave me a broad exposure to many issues. Every significant issue within the office usually bubbles up to the United States Attorney. So every day my day is filled with a series of legal issues and problems to respond to and to try to answer as best I can. Therefore, it gives me the ability to look at the law practice almost from a manage-

ment standpoint. It also gives me a broad range—all sorts of criminal exposure of every type, from violent crime to white collar crime, to major corporate crime, to civil rights prosecutions—but also exposure to the civil practice. We have about a dozen lawyers who represent the Government in civil practice.

That having been said, I can see where someone might say, "Well, is that the only viewpoint that he has?" No, to the contrary. I have also spent almost an equal amount of time as a defense lawyer. I have represented criminal defendants, I have represented targets who were never charged, I have represented witnesses in criminal cases and victims, and also, in private practice, I have had a broad exposure to civil matters, both representing plaintiffs, claimants and defendants.

Senator KYL. Well, thank you. I think that is helpful.

The general question I want to ask each of the District Court nominees has to do with the qualifications that some of you alluded to that give confidence to our citizenry that the judges understand life and understand their problems and will mete out justice not just in strict accordance with the law—obviously, you will do it in strict accordance with the law—but informed also by your life experiences.

And in that regard, I was impressed by several of the things in your resumes about things you have done. Gene Pratter, I just happened to turn to the note that I made about your Nurturing Network program, which I understand assists pregnant women.

And I just wonder if each of you would discuss, briefly, something that you have done either in association with law activities or perhaps even totally outside the law that you think will help make you a better judge because it is a life experience that you have had.

And if any of you would like to mention one of my primary interests—victims' rights—I would like you to do that. Because one thing we have found, and one reason that many of us here are proponents of a constitutional amendment to guarantee victims' rights, is that notwithstanding the fact that we have State law, statutory and even constitutional provisions allegedly guaranteeing rights of crime victims, that, as a Justice Department report noted, they are more honored in the breach than the observance, that, for one reason or another, prosecutors, other lawyers, judges sometimes are lax in enforcing these crime victims' rights.

We are not only dealing with the interests of the State and the Government and the defendant who may be on trial or the parties in civil litigation, but also, of course, we are interested in ensuring that victims do not suffer a second time when they have to go through the judicial process.

So I certainly do not limit my question to that, but anything that might bear on making them more comfortable, that if you are a trial judge you will consider their views as well, I think is an important one.

Let me start with you, Ms. Pratter, and then go to Judge Martinez and then finish with Neil Wake.

Ms. PRATTER. Thank you, Mr. Chairman, and I'm sure the folks at Nurturing network would thank you for your reference to them. It is a national program that assists pregnant women, unmarried

pregnant women who need to perhaps relocate to other parts of the country, and the network assists them in finding jobs and places to live and health care. And the folks in my firm have played a small role in providing employment opportunities for women who avail themselves of that. And it's been a pleasure to participate in that and many other programs such as assisting in the gathering of business clothing for women re-entering the workforce. And goodness knows those of us in law firms have been very fortunate in terms of both the work opportunities we've had and the compensation, and we've gathered a number of clothes and shared them with others who want to meet the challenges of their present lives by going back to work, and they may need some help in that respect. So I thank you for the reference to those kinds of programs.

With respect to the experiences I've had for 28, almost 29 years as an active lawyer, certainly in civil work sometimes lawyers are given to think of clients as being a faceless corporation, when, in fact, our clients are real people. They're worried about many things. They may, in fact, be most worried about the court procedures. It's sad to hear a client say when the worst thing that could happen to them is to have to go to court. Being sensitive to that and the sensitivity to the delays that can often occur in the litigation process I believe will be with me always. I believe that it's part of—an important part of a judge's job to move matters expeditiously and as economically as possible for all of the people involved in the process.

With respect to the criminal side, I think that a judge's role and job is to treat with great respect and sensitivity the role of the jurors, for example. The victims, absolutely, their fears and concerns and their families need to be given the opportunity to be heard, to be respected, to show that the system is concerned for them. And, without question, the defendants, of course, their rights and concerns need to be protected, and we need to be mindful of that.

And, frankly, the advocates for the government and for the defendant, the lawyers need to be respected. I have unbelievable respect for the hard work that lawyers put in day in and day out and carrying the mantle of their clients with them.

All of those people, all of those folks in the role of the legal system need to be respected.

Senator KYL. Judge Martinez?

Judge MARTINEZ. Thank you, Mr. Chairman, and thank you for giving me the opportunity to address this issue regarding victims' rights. I spent 10 years as a prosecutor. One of the things that drove me to do the absolute best job that I could in every single case was knowing that in a majority of cases that I was handling, there was usually a victim, a family member, someone that was completely devastated by what had occurred to them or their family. In every sentencing hearing where I stood, I made sure that they were there and that the court allowed them the opportunity to speak and to be heard.

When I became a superior court judge in 1990, having that sensitivity made me very aware of how critical that is to allow that to occur. As you know full well, victims feel re-victimized again by the system. They feel that they have no constitutional rights at all,

that everything goes towards the defendant's side. And I think our understanding as a judge of that, that pain, that grief, that frustration, can go a long ways towards making the process, if not better—because I don't think it ever goes away for them—at least more understandable and they feel they've had a part to play in that entire process.

There was a second part to your question, and that had to do about our involvement with the community. I've always believed—and I think you can tell by looking at my background—that a judge can't cloister himself or herself away from the rest of society. You have to stay involved. That's really the only way people understand that you do understand what is going on in everybody else's lives. And that's why it is important to be involved with feeding the homeless or, in my case, one of the things that I'm very dedicated to is coaching young children at many different levels.

And since I'm here before this Committee and under oath, I have to confess to you that I think I've received more fun and joy out of coaching than all the kids that I ever coached put together.

Thank you.

Senator KYL. Thank you very much. As I said, I think it is important for people to have confidence in our system, and one way they can have confidence in our system is to know that the judges up there are real people and not just automatons. And that is why I kind of ask this question, so that if anybody is paying attention, they will know that we have people who are not only highly qualified in the law, greatly experienced, but also real people who have actually helped in their local bar associations or community in some capacity.

Neil Wake?

Mr. WAKE. Thank you, Mr. Chairman. That's a big question for which we could give long answers, but let me focus on a few things that strike me personally.

The process of judging requires many skills, technical skills, education, academic skills, administrative skills, but one of the qualities that I think is most important here is a wisdom about life and people—the wisdom that can only come from experiencing the hardships or the difficulties that people have in life and in the litigation system.

You had asked about some activities that we might have been through, and let me point out two for me and my wife. Long ago, my wife became involved—more than me, but I was also involved—in an organization in Phoenix called the Sojourner Center, which is a shelter for battered women and children. Shari was one of the first directors, founding directors, and I did legal work for them, including defending them in a lawsuit over a construction matter without compensation, which, if we had lost the case, it would have been put out of business.

Sojourner Center now is a great success. It is one of the largest private shelters for battered women and children in the country. But we had an enriching experience dealing with other volunteers setting that up, getting it going, working with the people who benefited from that.

We also had another experience some 20 years ago where Shari and other parents founded a group, ICU Care Parents, which is a

parents' support group for parents of critically ill newborns. And we made arrangements with the three tertiary-care-level hospitals in the Phoenix area that dealt with critically ill newborns for referrals, and we organized a network of parents who could be called upon to talk and provide other support for parents experiencing that.

That group was a self-sustaining group that people participated and other people came in for about 10 years, and then it merged with another group in Phoenix, the group called Pilot Parents, which is a broader organization for handicapped children and the parents of handicapped children.

Through those activities, we have been able to share many things with many people in our community that I hope would give me, if I am given the opportunity to serve as a judge, to bring that wisdom to bear.

Like Ms. Pratter, I have a particular sensitivity to the effect on litigants of the cost of litigation. As an attorney representing everyone from individuals to business entities, I've seen too many cases where my clients simply elected not to pursue a just claim or not to defend against what I thought was an unjust claim because of the ability of opposing parties to make the costs of that increase.

Judges cannot prevent that entirely, but they can play a major role in administration of cases and getting them to a quick and economical resolution. So that is a second area of particular concern to me.

And, lastly, I would note a concern about the fear that regular folks have about being involved in the court system. This can often be witnesses and often litigants, and a judge has a particular ability to be sensitive to that, to make that easier and less stressful for people. So I think all of those respond in one way or another to the very important values that you are pointing to.

Senator KYL. Well, I thank all of you for your answers. It shows a breadth of experience and approach and a common thread of concern for litigants in our system of justice, but bring obviously different enriching experiences to the position. And I think as I said, it is important for us to stress those things when we explain to our constituents that we are confirming people who are not only well schooled in the law but also in life's experiences.

This is, I think, an extraordinary panel, and I am very pleased to have presided over this hearing to hear from each of you and give each of you an opportunity to share your views and also, of course, to introduce those who mean a great deal to you and who have supported you in your careers.

The next stage in the process will be that the full Judiciary Committee will review this testimony and, incidentally, have an opportunity to submit written questions to you, to which, obviously, you should respond as quickly as you can. There will be time afforded for additional statements to be put into the record of this hearing by the members of the Committee. And then after that, the full Committee will hold what we call a markup, which is really a business session, at which the nominees will be considered by the Committee and either voted up or voted down—voted up, sent to the full Senate for its consideration. And we hope that we can do this in a fairly quick fashion.

Obviously, if you have any questions about the process, you can be in touch with the Committee staff here, and they can help work through that.

If there is nothing else from any member of the Committee or any member of the panel, hearing nothing then I am going to declare this meeting adjourned. But I again thank all of you for being here today and I thank our participants on the panel.

This meeting is now adjourned.

[Whereupon, at 11:13 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Raymond W. Gruender
6045 Lindell Boulevard
St. Louis, Missouri 63112

February 3, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Responses of Raymond Gruender to the
Written Questions of Senator Patrick Leahy and Senator Richard Durbin

Dear Chairman Hatch:

Enclosed please find my responses to the written questions of Senator Patrick Leahy and Senator Richard Durbin. Thank you for your consideration of my nomination to the United States Court of Appeals for the Eighth Circuit.

Very truly yours,

Raymond W. Gruender

Enclosures

cc: The Honorable Patrick J. Leahy (w/enclosures)

Responses of Raymond Gruender,
Nominee to the U.S. Circuit Court of Appeals for the Eighth Circuit,
to the Written Questions of Senator Patrick Leahy
February 3, 2004

1. In the more than two years since September 11, the administration and the Department of Justice have taken many steps in the war on terrorism that scale back the right to counsel and other civil liberties. For example, the administration has taken the position that anyone, including American citizens, who is labeled an "enemy combatant" can be held indefinitely and denied access to lawyers, and that the detainees in Guantanamo can be held indefinitely with no way to challenge their captivity. What are your personal views of these developments? Justice Brandeis once said that, "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding"? Do you share his concerns? Why or why not?

Response:

If I am fortunate enough to be confirmed to the United States Court of Appeals for the Eighth Circuit, it would be my sworn duty to uphold the Constitution, including the Bill of Rights, and all civil rights and civil liberties identified by statute or relevant precedent. The Bill of Rights was adopted, at least in part, to protect individuals from the potential overzealousness of those in government. It certainly would be my duty and intent to protect each citizen's civil rights and liberties.

The matter of "enemy combatants" is an issue currently pending before courts and upon which I might be called to rule, if confirmed. Because I believe that it is necessary for a nominee to come to the judiciary as unencumbered with suggestions of bias or prejudice as possible, any hint or forecast as to how I might rule when faced with this issue or any similar issue would be imprudent and could require my recusal. In addition, it would be impossible for me to make an informed decision without the benefit of a complete record and legal briefs. I commit to the Committee that there is nothing in my personal beliefs that would prevent me from understanding and faithfully applying the law in this area.

2. As you know, the Director of the Executive Office for U.S. Attorneys sent out a memorandum to all U.S. Attorneys in August 2003, requesting that they assist in educating the public regarding the PATRIOT Act in several specific ways. Please tell me the efforts that you have taken in response to the EOUSA memorandum, including whether you (or anyone on your behalf) conducted community meetings in your district and whether you contacted congressional representatives to discuss the PATRIOT Act? Did you report to the EOUSA of your efforts and, if so, when and what did you report? What actions, if any, did you take in connection with

Attorney General Ashcroft's "16-state, 18-city PATRIOT Act tour" to defend the PATRIOT Act and the Department's implementation of its authorities?

Response:

After the August 2003 EOUSA memorandum, the Assistant U.S. Attorney (AUSA) in charge of the Anti-Terrorism Advisory Council (ATAC) in the Eastern District of Missouri conducted training sessions for federal, state and local law enforcement officers. In addition, he conducted a community meeting at the St. Louis area's largest Islamic mosque where, along with panel members from the FBI and the U.S. Attorney's office from the Southern District of Illinois, he participated in an educational discussion with respect to the PATRIOT Act and the government's anti-terrorism efforts. Separately, I attempted to contact several members of the Missouri congressional delegation and offered to make myself available to the member if he or she had any questions for me. None accepted this offer. These efforts were included in a report on August 29, 2003 by the ATAC coordinator to the EOUSA. This report also included several speaking engagements by the ATAC coordinator, which occurred prior to the EOUSA memorandum, as well as submissions I had made to the *St. Louis Post-Dispatch* in February 2003 about the University City City Council resolution on the PATRIOT Act. The Attorney General did not visit the Eastern District of Missouri as part of his PATRIOT Act education efforts. Therefore, I took no action in that regard.

3. What experiences can you point to from your background that demonstrate that, if confirmed, you will be able to hear cases involving the PATRIOT Act, or other complex criminal issues, impartially and fairly and set aside your experience as a U.S. Attorney?

Response:

While I have spent approximately seven years of my law career as a federal prosecutor, I have spent a greater number of years in private practice where approximately 25% of my practice involved representing criminal defendants, targets of criminal investigations and witnesses in criminal matters. In that role, I was committed to protecting and defending the rights of my clients. In addition, I worked on criminal and civil matters appointed by courts both to me and other members of my law firms. I believe that my experiences on both sides of criminal matters will help me to fairly and impartially judge criminal cases.

As the U.S. Attorney, my job is to utilize the tools available to me to enforce the laws passed by Congress. As a judge, my duty would be to evaluate the case before me and, in some cases, evaluate the constitutionality of a law. I have not formed or expressed any opinions with respect to the constitutionality of any provisions of the PATRIOT Act and would be able to apply fairly the law and any relevant precedent to a particular set of facts after the benefit of a record and legal briefing.

4. Earlier this year, Congress passed the "Feeney Amendment," which restricts the ability of Federal judges to depart from the Sentencing Guidelines, and Attorney General John Ashcroft recently ordered U.S. Attorneys across the nation to become more aggressive in reporting to the Justice Department cases in which federal judges impose sentences that depart from the sentencing guidelines. As you noted at your hearing, this legislation has come under attack by a number of Federal judges nationwide, as well as Chief Justice Rehnquist and the U.S. Judicial Conference. One respected judge– the Honorable John Martin – was so outraged by the Feeney Amendment's assault on judicial independence that he announced that he would resign from the bench. Judge Martin was appointed to the bench by the first President Bush in 1990, after years of service as a Federal prosecutor, including 3 years as the U.S. Attorney for the Southern District of New York. He explained his decision to resign in a New York Times op-ed, as follows:

> **"Every sentence imposed affects a human life and, in most cases, the lives of several innocent family members who suffer as a result of a defendant's incarceration. For a judge to be deprived of the ability to consider all of the factors that go into formulating a just sentence is completely at odds with the sentencing philosophy that has been a hallmark of the American system of justice."**

Do you agree or disagree with Judge Martin on this point and why?

Response:

As I mentioned at my hearing, I am aware that this is a topic of much debate amongst judges and lawmakers. For the reasons cited in question one above, I am reluctant to provide any personal opinions on legal issues that may come before me, if confirmed. As someone who has served both as a prosecutor and as a criminal defense attorney, I have a unique understanding and appreciation for the effect that a criminal sentence has on the life of the individual being sentenced, his or her family members as well as the victims of that crime.

I believe that Congress enacted the sentencing guidelines, at least in part, to ensure more uniform sentencing across the country. There sometimes had been significant disparity in sentences for the same or similar crimes simply because different judges had different views on what constituted a just sentence. It has long been the function of Congress to define a crime and the punishment associated with the crime, and I would defer to the determinations of Congress in this and other matters of policy.

5. During your tenure as U.S. Attorney, have you complied with the Attorney General's request and reported any instances of sentencing to the Justice Department? If so, please describe the circumstances.

Response:

The U.S. Attorney's Office for the Eastern District of Missouri has complied with PROTECT Act requirements and Department of Justice (DOJ) policy with respect to reporting to DOJ adverse decisions, including adverse sentencing decisions. Since the passage of the PROTECT Act, the U.S. Attorney's Office has reported to DOJ several instances involving adverse criminal sentencing decisions that warranted consideration for appeal in accordance with DOJ policy because the cases involved departures that may not have been authorized by the sentencing guidelines.

6. You wrote, in the outline of a speech that you delivered to Missouri prosecutors on March 28, 2002, that when both state and federal prosecutors can try a defendant, the prosecuting office that can "get most bang for the buck" should prosecute. What did you mean by "most bang for the buck"? Do you consider a longer sentence to be the "most bang for the buck"? Do you think that sentences that are being handed down in federal court are too short? Why or why not?

Response:

This speech outline point related to a prosecutor's duty to provide the public with the greatest possible protection from criminals, especially violent criminals, and the appropriate jurisdiction in which to accomplish that goal. In some cases, the federal criminal system provides certain advantages for prosecutors, such as longer criminal sentences, pre-trial detention, asset forfeiture provisions or different evidentiary requirements. In other cases, the state criminal system is more advantageous. While I was not exclusively referring to the length of the sentence, that is a significant factor used by prosecutors to determine whether a prosecution should be handled in the state or federal system. It also is important that federal and state prosecutors coordinate their efforts in order to use prudently the limited resources provided to them.

Federal sentencing policy is a matter to be determined by Congress and the Sentencing Commission. I do not have an opinion generally as to whether federal sentences are too long or too short.

7. You were an Assistant U.S. Attorney at the time of a high-profile incident in the community involving the shooting and tragic death of two individuals by a DEA agent and a police officer. You later became the U.S. Attorney and supervised a year-long investigation into the shooting. The report said that there was insufficient evidence to establish beyond a reasonable doubt that either officer acted willfully to

deprive the two individuals of their constitutional rights. It was reported in the St. Louis Dispatch on October 4, 2001 that you met with ten civil rights leaders about your investigation into the shooting and that three of them were so displeased, they walked out of the meeting.

a. In hindsight, is there anything that you would have done differently?

Response:

Shortly after I became U.S. Attorney and after a St. Louis County grand jury found insufficient evidence to indict the two officers on state charges, this matter became the subject of intense community interest. As a result, not only did I review personally some of the critical evidence, but I actively engaged the Department of Justice's Civil Rights Division in the matter. It is not the practice of federal prosecutors to release any information when a matter is not prosecuted. However, when the investigation was complete, the Civil Rights Division and the U.S. Attorney's Office took the extremely unusual steps of preparing and publishing an investigative report, meeting with the family of the deceased and meeting with local civil rights leaders in order to disclose and explain the results of the investigation.

While the family members and civil rights leaders wanted prosecutions, they appreciated our willingness to meet with them. I recall only one person leaving the meeting we conducted with civil rights leaders. The remainder listened to our presentation and asked various questions to which we responded. In addition, the Chief of the Criminal Section of the Civil Rights Division and I conducted a press briefing and fielded all questions from the press. While, in hindsight, some thought that we should not publicly have disclosed the details of a matter in which we were not bringing charges, I felt that the community and the families of the deceased deserved to have their questions answered.

b. What steps can be taken to prevent such tragedies?

Response:

Although I am not an expert in police procedures, I think that such experts should review this and other similar situations to determine if any lessons can be learned. Such a study could provide valuable training to officers to better protect themselves as well as those who are subject to arrest. I believe that more and better training for law enforcement officers makes them safer and is good for the entire community.

c. Based on this experience, do you think that Congress should change the standard in 18 U.S.C. Section 242, and, if so, how?

Response:

As a judicial nominee, I would hesitate to recommend a change in the standard under 18 U.S.C. 242. I would defer to Congress to make such policy determinations. At the time we announced the results of the investigation, we stated that we could not prove, beyond a reasonable doubt, all of the necessary elements in order to bring a case under that section, the only statute available to us under these circumstances. We also noted that there were several state manslaughter and murder laws that the St. Louis County grand jury considered.

d. Please share with the Committee how, if confirmed, you will ensure that Americans' civil rights will be protected under America's civil rights laws.

Response:

Throughout my career both as a prosecutor and as a criminal defense attorney, I have worked diligently to ensure that the civil rights of my clients, as well as those whom we prosecuted, were protected fully. If I am fortunate enough to be confirmed, I will continue to apply diligently all laws and precedent that protect Americans' civil rights.

8. You have been a member of the Federalist Society for over 15 years. During this time, the Federalist Society has been a leading advocate of the expansion of states' rights at the expense of federal power. It has also advocated for limitations on Congress' ability to enact laws to protect individuals and civil rights and to regulate commerce. For example, over the last decade, the Supreme Court has issued a series of 5-to-4 decisions limiting congressional power under the Commerce Clause. As you know, I am referring to the decisions in such cases as United States v. Lopez, which held that Congress could not prohibit guns in or near schools, and United States v. Morrison, which struck down a provision of federal law that let women sue their attackers in federal court. These decisions hold that Congress may not regulate what the Court calls "non-economic" activity (e.g., gender-motivated crimes of violence) even if the aggregate effect of such activity on the national economy is substantial.

a. Do you agree that Congress's power to regulate an intra-state activity should turn on whether the activity can be classified as "economic" or "non-economic"?

Response:

Although I have not studied these Supreme Court decisions at length, I am familiar with their holdings. If faced with such an issue, I would begin with the well-accepted

presumption that an act of Congress is constitutional and that findings of unconstitutionality should be rare. I then would conduct a thorough review of all applicable Supreme Court decisions and would, to the best of my ability, attempt to understand and apply binding precedent. Under certain facts and circumstances, several Supreme Court cases recognize a distinction between economic and non-economic regulation. Of course, as long as these cases remain binding Supreme Court precedent, I would be required to apply them. It is impossible to express reasoned opinions without the benefit of the decision making process, a complete factual record, including the considerations of Congress in passing the legislation, and legal briefing. Of course, if confirmed, I would be bound to and would apply Supreme Court precedent.

b. Last Congress, the House of Representatives passed a bill to prohibit human cloning. Do you see any tension between such legislation and the Court's new federalism doctrine? In your view, is human cloning more or less "economic" in nature than gender-motivated crimes of violence?

Response:

Without a complete record, it is difficult to anticipate the type of challenge that might be made to such a statute. In order to reach a decision if such a matter were to present itself, I would engage in the judicial decision making process. I would begin with the well accepted presumption that an act of Congress is constitutional and that findings of unconstitutionality should be rare. Then, with a complete understanding of the factual record, including findings of Congress, as well as the nature of the challenge being made to the legislation, I would review the briefs and determine and study all relevant case law. Having a complete understanding of the facts and law, I would do my best to apply faithfully the law to the specific facts of the matter before me. Without such a record and without being able to engage in the deliberative process including consultation with the other judges hearing the matter, I am reluctant to speculate on any possible conclusion that I might reach.

c. Do you agree with the President, who in his first State of the Union said that education is the first essential part of job creation, or do you agree with the Supreme Court majority in United States v. Lopez, which said that education is a "non-economic" activity and is therefore outside the federal regulatory power?

Response:

If confirmed, I will evaluate each case on its own merits and in light of applicable precedent. For instance, in the area of education, there are a number of cases where courts have upheld federal government regulation. In *Cedar Rapids Community School*

District v. Garrett F., 119 S. Ct. 992 (1999), the Court found that, under the Individuals with Disabilities Education Act, a school district was required to provide continuing nursing services to a quadriplegic student. Without the benefit of a complete record and the decision making process described above, it is impossible to express a well reasoned opinion. I would, however, be bound to apply Supreme Court precedent.

9. In the past few years, the Supreme Court has struck down a number of federal statutes, most notably several that are designed to protect the civil rights of Americans, as beyond Congress's power under Section 5 of the Fourteenth Amendment, for example, *Flores v. City of Boerne*, 117 S. Ct. 2157 (1997), *Kimel v Florida Board of Regents*, 120 S. Ct. 631 (2000), and *Board of Trustees v. Garrett*, 19 S. Ct. 2240 (1999). The Supreme Court has also recently struck down statutes as being a violation of the 10th Amendment or the 11th Amendment under the Court's expansive view of state's rights. These cases have been described as creating new power for state governments while diminishing federal authority.

a. What is your view of these developments? Do you think they constitute "judicial activism?" What is your understanding of the scope of congressional power under Article I of the Constitution, in particular, the Commerce Clause, and under Section 5 of the Fourteenth Amendment?

Response:

I am familiar with the holdings of these cases as well as other relevant cases such as *Nevada v. Hibbs*, 123 S. Ct. 1972 (2003), although I have not studied these decisions in depth. I believe that these cases and several other Supreme Court cases define for lower court judges the scope of congressional power under Article I of the Constitution and under Section 5 of the Fourteenth Amendment. Many cases recognize distinctions between the federal government and state governments as embodied in the Tenth and Eleventh Amendments. However, these cases also allow that Congress can utilize Section 5 of the Fourteenth Amendment to abrogate the States' sovereign immunity where Congress makes its intention to do so unmistakably clear in the language of the statute and where it acts pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment. The Supreme Court requires that valid Section 5 legislation exhibits congruence and proportionality between the constitutional injury to be prevented or remedied and the means adopted to that end.

b. The New York Times has said that the present Supreme Court has "struck down more Federal laws per year than any Supreme Court in the last half of the century." Are there any federal statutes or sections of federal legislation that have not yet been ruled upon by the

Supreme Court that go beyond Congress' enumerated powers under the Constitution, in your view?

Response:

While I am unable identify any legislation that goes beyond Congress' enumerated powers, I can describe the process I would utilize in analyzing a constitutional challenge to a statute. Prior to deciding such a case, I would work diligently to understand and analyze all relevant precedent. I would begin with the accepted presumption that an act of Congress is constitutional and that findings of unconstitutionality should be rare. I would apply the various standards of review given to lower courts by the Supreme Court such as strict scrutiny for issues involving fundamental constitutional rights or suspect classifications, or rational basis in certain other areas. With the relevant standard and presumption in mind and after gaining a complete understanding of the record and the law, I would engage in the deliberative process and apply the relevant law to the facts before the court.

10. What qualities do believe a judge must possess to faithfully uphold his constitutional duty to interpret the law? Do you feel you have demonstrated those characteristics? Why or why not?

Response:

Among others, a judge should demonstrate the following characteristics:

- Intellectual ability, including clarity and logic in both thought and writing;
- The willingness to work hard to master the facts and law of every case; and
- Judicial demeanor, including open mindedness, willingness to listen, humility, courteousness and empathy.

Most importantly, in order to faithfully uphold his or her constitutional duty to interpret the law, a judge must understand and accept the limited role of the judiciary, which is inherent in our Constitution. A judge must be committed to applying and interpreting the law. A judge must avoid substituting his or her personal opinions for the law. A judge also should avoid legislative and executive functions.

My academic and legal record, as well as my record as U.S. Attorney, clearly demonstrate that I am committed to the rule of law and understand the limited role of each branch of government. I have never sought to exceed my assigned role as a lawyer or prosecutor nor have I ever allowed my personal beliefs to enter into the decision making process.

11. Some of the most beloved judges in our history are judges who have stood up to the popular sentiment to protect the rights of minorities or people whose views made them outcasts or pariahs. Please tell us one instance in your professional career where you took an unpopular stand or represented an unpopular client and stood by it under pressure.

Response:

There have been numerous instances in my career where I have represented unpopular clients or views. For instance, I have represented numerous criminal defendants and targets of criminal investigations. I also have represented employees against their employers, including government entities. I have accepted criminal and civil appointed cases, and have assisted other attorneys on their appointed cases. As a prosecutor, I have refused on several occasions to bring charges despite pressure from victims, law enforcement, the press and the public, where I believed charges would be unjustified.

In my personal capacity, I have volunteered for and worked with groups that sought to assist those in society who most need help. I served on the Board of Directors of A.L.I.V.E. (Alternatives to Living in Violent Environments), a not-for-profit organization dedicated to eliminating domestic violence and assisting victims of domestic violence. At that time, victims of domestic violence were not well served and generally were unrepresented in the community. I served as Board president for two years and did my best to raise awareness about and serve victims of domestic violence. Finally, I have served on the Allocations Committee of the Variety Club of St. Louis for the past seven years, the purpose of which is to evaluate, assist and provide funding to not-for-profit organizations that serve disadvantaged and disabled children.

Responses of Raymond Gruender,
Nominee to the U.S. Circuit Court of Appeals for the Eighth Circuit,
to the Written Questions of Senator Richard Durbin
February 3, 2004

1. **At your hearing, I asked you about your criticism of a February 2003 resolution passed by the University City, Missouri City Council expressing concern about the PATRIOT Act. At your hearing, you testified: "The resolution, on its face, was based upon what I believe to be wrong statements about the PATRIOT Act."**

   A. **What specific statements in the resolution do you consider to be wrong, and what do you consider to be wrong about them?**

Response:

My editorial submissions regarding the University City, Missouri City Council resolution concerning the PATRIOT Act were based on both press accounts of the hearings leading up to the resolution and on the resolution itself. Press accounts reflected that neither the City Council nor the press sought or heard any information or opinions other than those opposed to the PATRIOT Act. Press accounts suggested that the resolution's proponents told the City Council that, amongst other things, the PATRIOT Act allows the government to obtain search and seizure warrants and electronic surveillance without the requirement of judicial oversight. The resolution, though not as direct, reflected this misinformation when it stated that the PATRIOT Act could result "in infringing on fundamental liberties protected by due process and 'probable cause' including freedom of speech, assembly and privacy; the right to legal counsel and due process in judicial proceedings; and protection from unreasonable searches and seizures ..."

As I stated in my February 14, 2003 submission to the *St. Louis Post-Dispatch*, I was surprised by the City Council's failure to seek any opposing views. As the *St. Louis Post-Dispatch* recognized, my submission raised a legitimate legal question and helped to create a healthy debate. I stated at that time and continue to believe that claims of warrantless searches, seizures and wiretaps being permitted as a result of the PATRIOT Act are inaccurate. Judicially issued, independent determinations of probable cause remain the necessary legal standard for searches, seizures and wiretaps. In addition, supporters of the resolution suggested that law enforcement could intercept the content of e-mails without a court order. This claim is inaccurate. The resolution and its supporters also suggested that ethnicity, religion and race were now appropriate considerations in initiating investigations. This also is not true.

   B. **Do you stand by your criticism of this resolution, particularly your assertion that the resolution is "putting lives in jeopardy and increasing the chances for terrorists to be successful"?**

Response:

In addition to basing the resolution on inaccurate information about the PATRIOT Act, the University City City Council took the additional step of directing its employees, including its police department and public safety officials, not to cooperate with federal authorities where they believed such cooperation could result in the infringement of civil rights and civil liberties. As I stated during my hearing, preventing and disrupting terrorist activities is a tremendous responsibility facing federal law enforcement, especially after September 11, 2001. In order to accomplish this difficult assignment, it is critical that all levels of law enforcement cooperate completely and readily share information. As a result, I was concerned that a law enforcement or public safety officer might hesitate to cooperate or share critical information based on false understandings about the PATRIOT Act or the intentions of federal law enforcement. As such, I stand by my criticism of the resolution.

As noted in my *St. Louis Post-Dispatch* submission, "Had the resolution merely affirmed the importance of protecting civil rights and liberties, there would be no controversy. Federal prosecutors and law enforcement officers are sworn to uphold the Constitution." Of course, we all are in agreement that law enforcement must protect civil rights and liberties while it attempts to prevent, disrupt and, if necessary, prosecute terrorists.

C. In what ways if any do you believe that Congress went too far in passing the PATRIOT Act? What revisions of the bill would you recommend we make?

Response:

In neither of my submissions to the *St. Louis Post-Dispatch* did I express an opinion as to the constitutionality of any of the provisions of the PATRIOT Act. As a judicial nominee, it would not be appropriate for me to express any opinion as to whether or not Congress went too far in passing the PATRIOT Act, especially as it is possible that such issues could come before me as a judge, if the Senate chooses to confirm me. For similar reasons, as a judicial nominee, I am uncomfortable making recommendations to Congress with respect to revisions to the PATRIOT Act. I am confident that the appropriate office of the Department of Justice would be pleased to work with Congress on such issues.

2. At your hearing, I asked you about the apparent inconsistency between your assertion in your February 14, 2003 unpublished letter to the *St. Louis Post-Dispatch* that, "Judicially issued, independent determinations of probable cause remain the necessary legal standard" under the PATRIOT Act, and the plain meaning of Sections 215 and 505 of the PATRIOT Act. You testified that, while you did not have a copy of the letter, you "believe what I was referring to were wiretaps." However, in context, it is clear that you were referring not

just to wiretaps, but also to searches and seizures. In your February 14, 2003 letter you wrote:

> **"Among the many inaccuracies reported in support of the resolution are claims that new federal enactments permit warrantless searches, seizures, and wiretaps. Such claims are completely false. Judicially issued independent determinations of probable cause remain the necessary legal standard."**

Further, in a letter to the editor of the *Post-Dispatch* published on February 22, 2003, you wrote that "[F]oreign intelligence warrants always have required, and still require, a judicial probable cause finding that a foreign power or agent is engaged in foreign intelligence crimes."

However, under Section 215 of the PATRIOT Act, if the federal government seeks an order to obtain "any tangible thing" from any business, there is no evidentiary showing required. The judge "shall" issue the order if the government certifies that the records are "sought for" an international terrorism or intelligence investigation. The government need not show that the person targeted by the order is a suspected terrorist, or spy, or engaged in anything illegal.

Under Section 505 of the PATRIOT Act, the FBI can issue a national security letter (NSL) to obtain personal records by certifying that the records are sought for an international terrorism or intelligence investigation, regardless of whether the person whose records are sought is a suspect. NSLs are documents, signed by FBI agents, that request personal information and do not require judicial or grand jury approval.

In both of these instances, the law contradicts your statements that before the government engages in secret surveillance or searches of Americans it must have significant evidence that the person targeted is breaking the law. In this light, do you still stand by your statements?

Response

My reference to "[j]udicially issued, independent determinations of probable cause remain the necessary legal standard" referred to the prior sentence regarding searches, seizures and wiretaps. In my February 22, 2003, letter to the editor, I again was referring to Foreign Intelligence Surveillance Act (FISA) search and seizure and electronic surveillance warrants. Thus, my statements were limited to searches, seizures and wiretaps and were not intended to address either section 215 or section 505 of the PATRIOT Act.

Sections 215 and 505 amend previously existing statutes that, similar to a grand jury subpoena or an administrative subpoena, allow law enforcement to seek the production of various tangible items, such as documents and records, from the person or entity in possession of them but do not allow law enforcement to enter the premises and search for or seize the records sought. The statutes amended by Sections 215 and 505 allowed and continue to allow the government to compel the production of certain records either by serving a FISA Court order (Section 215) or a national security letter (Section 505) upon the person or entity from whom the items are sought. Thus, these sections and the statutes amended by them do not involve a search, seizure or electronic surveillance.

3. On your Senate questionnaire, you disclosed that you are a member of two all-male organizations, Veiled Prophet and the Shamrock Club.

A. Are you still a member of these clubs? If so, do you have any plans to resign from them?

Response:

I no longer am a member of either organization. The Shamrock Club's sole purpose is to conduct a dinner on St. Patrick's Day. The Veiled Prophet is a civic, charitable and fraternal organization, the main purpose of which is to organize a yearly community fair and parade. Neither organization owns a meeting facility.

B. In your opinion, why do these organizations fail to attract or decline to accept women as members?

Response:

Although I was a member of each of these organizations, I have never served in any capacity beyond simple membership nor was I active in organization or management. Therefore, I was not in a position to understand the source of or to influence the policies of each organization.

C. What efforts if any have you made to try and integrate the organizations with women?

Response:

As indicated above, I was not active in the organization or management of these clubs.

4. You have been a member of the Federalist Society for over 15 years, since 1988. Why did you join this organization and what has been the extent of your involvement in it?

Response:

I believe that I first was introduced to the Federalist Society in a speech delivered by or a discussion with the Honorable Pasco Bowman, the well respected jurist whom I have been nominated to succeed. At the time I joined, the Federalist Society provided various forums for open discussion and debate on a wide range of legal issues and did not take public positions on issues. I have not served as an officer or committee chair, nor have I been active in any committee of the Federalist Society. While I never have attended any national conferences, I have attended approximately ten local meetings.

5. The mission statement of the Federalist Society states: *"Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society.* " Do you agree with this statement? Why or why not?

Response:

In my experience as a law student, an attorney in private practice and a federal prosecutor, I have encountered many attorneys from across the political and philosophical spectrum. I never have attempted to measure the extent to which the legal profession is dominated by any particular orthodoxy. I believe that law schools, the legal profession and our country as a whole are best served when all viewpoints are represented and respected.

Raymond W. Gruender
6045 Lindell Boulevard
St. Louis, Missouri 63112
February 25, 2004

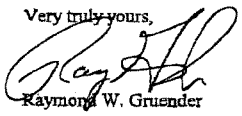
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Responses of Raymond Gruender to the Written Follow-up Questions of Senator Richard Durbin

Dear Chairman Hatch:

Enclosed please find my responses to the follow-up questions of Senator Richard Durbin with respect to my nomination to the United States Court of Appeals for the Eighth Circuit.

Very truly yours,



Raymond W. Gruender

Enclosures

cc: The Honorable Patrick J. Leahy (w/enclosures)

Responses of Raymond W. Gruender
to the Written Follow-up Questions of Senator Richard J. Durbin
February 25, 2004

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. **In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.**

Response:

I did not meet with any members of the staff of the Senate Judiciary Committee in preparation for my confirmation hearing. Members of the staff of the Senate Judiciary Committee did not share, reference or provide me with any information that I was led to believe was obtained or derived from Democratic sources. Members of the staff of the Senate Judiciary Committee did not provide me with any documents or excerpts from documents that appeared to have been drafted or prepared by Democratic staff.

2. **In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If**

so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response:

In preparation for my confirmation hearing before the Senate Judiciary Committee, I met with members of the staff of the U.S. Department of Justice. The members of the Department of Justice staff did not share, reference or provide me with any information that I was led to believe was obtained or derived from Democratic sources. The members of the Department of Justice staff did not provide me with any documents or excerpts of documents that appeared to me to have been drafted or prepared by Democratic staff.

3. **In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.**

Response:

In preparation for my confirmation hearing before the Senate Judiciary Committee, I met with members of the staff of the White House. The members of the White House staff did not share, reference or provide me with any information that I was led to believe was obtained or derived from Democratic sources. The members of the White House staff did not provide me with any documents or excerpts of documents that appeared to me to have been drafted or prepared by Democratic staff.

4. **In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did**

any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response:

I did not meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees in preparation for my confirmation hearing. No one associated with any individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees shared, referenced or provided me with any information that I was led to believe was obtained or derived from Democratic sources. No one associated with any individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees provided me with any documents or excerpts from documents that appeared to have been drafted or prepared by Democratic staff.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

CHAMBERS OF
RICARDO S. MARTINEZ
UNITED STATES MAGISTRATE JUDGE

304 U.S. COURTHOUSE
SEATTLE, WA 98104
(206) 553-1396

February 25, 2004

Senator Orrin Hatch
Chair, Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I am faxing to the Department of Justice the responses to Senator Durbin's questions that were submitted to me earlier today. Please let me know if there is anything else needed.

Sincerely,

Ricardo S. Martinez,
United States Magistrate Judge

Responses of Ricardo S. Martinez to the Written Follow-up Questions of Senator Richard J. Durbin

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

   Response:

   I did not meet with any staff from the Senate Judiciary Committee. No staff member has shared, referenced or provided me with any information, documents, or excerpts from documents that appeared to come from, were obtained from, derived from, or that I was led to believe came from, any Democratic sources.

2. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented

with such information or documents.

Response:

I did meet with staff from the U.S. Department of Justice. No staff member has shared, referenced or provided me with any information, documents, or excerpts from documents that appeared to come from, were obtained from, derived from, or that I was led to believe came from, any Democratic sources. No one discussed anything like this at any time.

3. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response:

I did meet with staff from the White House. No one has shared, referenced or provided me with any information, documents, or excerpts from documents that appeared to come from, were obtained from, derived from, or that I was led to believe came from, any Democratic sources. No one discussed anything like this at any time.

4. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response:

I did not meet with anyone associated with individuals, groups or organizations like these at any time. No individual, group, organization, or anyone associated with such a group, has shared, referenced or provided me with any information, documents, or excerpts from documents that appeared to come from, were obtained from, derived from, or that I was led to believe came from, any Democratic sources.

821 Harriton Road
Bryn Mawr, PA 19010

February 25, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Gene E.K. Pratter Nomination for the Eastern District of Pennsylvania

Dear Senator Hatch:

I respectfully enclose my responses to the written follow-up questions of Senator Richard J. Durbin.

Because I am out of town I have authorized my assistant, Rose A. Barber, to sign this letter on my behalf, but the enclosed responses have been written by me.

Respectfully,

Gene E.K. Pratter

Enclosure
Dictated but not read or signed by Gene E.K. Pratter.

Responses of Gene E.K. Pratter to the Written

Follow-up Questions of Senator Richard J. Durbin

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: In late December 2003 or early January 2004 I received a conference call from two Committee staffers – one who worked for Senator Hatch, the other for Senator Leahy. Senator Leahy's staff member asked me one question about my background. Senator Hatch's staff member asked me no questions. The conversation was less than five minutes and had nothing to do with the subject of this inquiry. No, as to remaining follow-up questions.

2. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: On January 21, 2004, with two other nominees, I met with various DOJ staff to prepare for the hearing. It was all about the "mechanics" of the next day and nothing at all suggestive of the subject of this inquiry. No, as to remaining follow-up questions.

3. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: Same as Response to No. 2 above. No.

4. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: No.

821 Harriton Road
Bryn Mawr, PA 19010

January 30, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I respectfully enclose my responses to written questions from Senator Leahy, supplementing my testimony before the Committee on Thursday, January 22, 2004.

Thank you for the opportunity to consider the thoughtful observations contained in these follow-up questions and to respond to them. I also thank you and each of your Committee colleagues for the courtesies and consideration extended to me.

Sincerely,

Gene E.K. Pratter

Enclosure

cc: The Honorable Patrick J. Leahy (w/encl.)
Ranking Member

RESPONSE OF GENE E.K. PRATTER TO WRITTEN QUESTIONS FROM SENATOR PATRICK LEAHY

1. In many of the cases that you describe in your Senate Questionnaire as your most significant, you defended a corporation in a civil action. At your hearing, you told Senator Kyl that your years of practice have made you sensitive to the concerns of corporations. You said that, "sometimes lawyers are given to think of clients as being a faceless corporation, when, in fact, our clients are real people. They're worried about many things. . . Being sensitive to that and the sensitivity to the delays that can often occur in the litigation process I believe will be with me always." I agree that it is important to be sensitive to litigation delays but it is also important to be fair to all parties who appear before you. Given your experiences defending corporations in civil suits and your stated sensitivity to their concerns, do you think that you will be able to treat all parties who appear before you fairly? What assurances can you give this Committee that you will be fair and impartial to all parties?

Response: I appreciate the opportunity to expand upon my comments at the January 22 hearing before the Committee and to reiterate my unequivocal belief that due process must never be sacrificed and every party to any legal proceeding is entitled to be treated fairly and impartially at all times. If I am confirmed to serve as a federal judge, I pledge to do so.

I have represented individuals and companies, many of which were small, closely-held or family-owned endeavors, sole proprietorships, local or regional partnerships or professional firms, schools or other non-profit organizations, as either plaintiffs or defendants in

litigation matters involving personal, property, professional, representative or business matters in roughly equal numbers over the 29 years of my practice. I have learned how important it is for each of them to be, and to perceive that they are being, treated fairly by the court and by the legal system in general. As counsel, I always consider it an important obligation to explain to my clients the dynamics of the legal process, the ramifications of various developments, the costs in terms of expense and time of certain discretionary and mandatory features of litigation and why the integrity of the legal process must be respected. I have been attentive particularly to the needs and expectations of individual clients because they often have had less experience with litigation. The presiding judge's demonstrable sensitivity to the parties' and their counsels' concerns for the fundamental fairness and impartiality of the judicial process is the single most important and successful means for maintaining respect for law in any given case and in general. I can think of no higher accolade applicable to a judge than to say he or she is a judge who gives every person a full, fair and impartial "day in court." If confirmed, that is the kind of judge I would strive to be.

2. **Two important traits for a judge to have are open-mindedness and fair-mindedness. Judges need to be able to listen to arguments and change their minds about an issue if warranted by the law and facts. Could you give me an example from your legal career where you have changed your mind or reversed a position based on the information that a client or another lawyer presented to you?**

Response: It is extremely important for a judge to be open-minded and fair-minded. In my personal and professional life, and as a result of the maturation process in both, I have learned that an impulsive rush-to-judgment is rarely successful. Every controversy, almost by definition, will be better resolved through a deliberate process. As a result, I frequently counsel both clients

and colleagues that it is imprudent to believe any useful and reliable conclusions can be reached without first considering all sides of the pertinent factual and legal issues. I realize that the law is dynamic; for example, a new statute or new case law can bring dramatic changes to even the clearest of cases. I recall learning to appreciate how susceptible to change the landscape of a legal matter can be quite a number of years ago in the context of preparing for a settlement conference in a major case following a lengthy period of rigorous discovery and briefing of complicated legal issues. Throughout the pre-trial proceedings the client and I had shared unshakeable confidence in our position on a key evidentiary issue. Victory on that issue virtually guaranteed victory in the case. In the course of evaluating the full record and our opponent's settlement memorandum which included a number of meritorious arguments that arose from certain recent changes in the governing case law, it became clear that "victory" was no longer likely and our client would be better served by my quickly ameliorating our view of the case so that an equitable and prompt settlement could be achieved. Changing course to persuade that client to appreciate new vulnerabilities in a case we both had considered to be almost impregnable taught me the lesson to always remain open to new developments and new perspectives.

Keeping an open mind and recognizing the likelihood that there will be views and arguments I have not personally anticipated has been essential in the work I have undertaken in the last decade as a settlement master, mediator and judge pro tem in various case management programs. I have approached the cases assigned to me in those programs by first recognizing that very few of the disputes are exactly as they appear from the rudimentary pleadings. Only by resisting improvident quick assumptions and, instead, giving every side in the matter the opportunity to explain their positions, their views of the law, and their possibly

novel interpretations, and then considering the implications of the parties' submissions have I been able to assist the supervising court and the parties involved by resolving disputes or at least significantly reducing the issues to be addressed. Often the resolution has been different than what a first impression of the dispute would have suggested. If confirmed to serve as a federal judge in the Eastern District of Pennsylvania I would certainly bring these views to bear on my responsibilities.

LAW OFFICES OF
NEIL VINCENT WAKE
3030 NORTH THIRD STREET
SUITE 1220
PHOENIX, ARIZONA 85012-3050

L VINCENT WAKE
DA D. SKON

tel: (602) 532-5944
fax: (602) 241-9862
WAKE@WAKELAW.COM

February 25, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Questions for Neil Vincent Wake
Nominee to the District Court of Arizona
Submitted by Senator Durbin

Dear Mr. Chairman:

I am pleased to write in response to further questions submitted by Senator Durbin. I appreciate the opportunity to address the matters raised by Senator Durbin. The questions and my responses are enclosed herewith.

Very truly yours,

Neil Vincent Wake by ds

Neil Vincent Wake

cc: The Honorable Patrick J. Leahy
Ranking Member

Responses of Neil Vincent Wake
to the Written Follow-up Questions of
Senator Richard J. Durbin

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

   Response: On January 20, 2004, two days before my confirmation hearing before the Senate Judiciary Committee, I paid a courtesy call to two staff members for my home state Senator Jon Kyl and spoke briefly about the hearing process. At no time have they or any staff of the Senate Judiciary Committee shared, referenced, or provided me with information that I was led to believe was obtained or derived from Democratic sources. At no time has any staff of the Senate Judiciary Committee provided me any documents or excerpts from documents that appeared to me to have been drafted or prepared by Democratic staff.

2. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so,

during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: On January 21, 2004, the day before my confirmation hearing before the Senate Judiciary Committee, I met with staff of the U.S. Department of Justice and a staff person of the White House in preparation for my confirmation hearing before the Senate Judiciary Committee. At no time has any staff of the U.S. Department of Justice or staff of the White House shared, referenced, or provided me with information that I was led to believe was obtained or derived from Democratic sources. At no time has any staff of the U.S. Department of Justice or staff of the White House provided me any documents or excerpts from documents that appeared to me to have been drafted or prepared by Democratic staff.

3. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: On January 21, 2004, the day before my confirmation hearing before the Senate Judiciary Committee, I met with staff of the U.S. Department of Justice and a staff person of the White House in preparation for my confirmation hearing before the Senate Judiciary Committee. At no time has any staff of the U.S. Department of Justice or staff of the White House shared, referenced, or provided me with information that I was led to believe was obtained or derived from Democratic sources. At no time has any staff of the U.S. Department of Justice or staff of the White House provided me any documents or excerpts from documents that appeared to me to have been drafted or prepared by Democratic staff.

4. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or

organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: In preparation for my confirmation hearing before the Senate Judiciary Committee, I did not meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees. At no time have any individuals, groups, or organizations shared, referenced, or provided me with information that I was led to believe was obtained or derived from Democratic sources. At no time have any individuals, groups, or organizations provided me any documents or excerpts from documents that appeared to me to have been drafted or prepared by Democratic staff.

LAW OFFICES OF
NEIL VINCENT WAKE
3030 NORTH THIRD STREET
SUITE 1220
PHOENIX, ARIZONA 85012-3050

NEIL VINCENT WAKE
LINDA D. SKON

tel: (602) 532-5944
fax: (602) 241-9862
WAKE@WAKELAW.COM

January 30, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Questions for Neil Vincent Wake
Nominee to the District Court of Arizona
Submitted by Senator Leahy

Dear Mr. Chairman:

I am pleased to write in response to further questions submitted by Senator Leahy on January 29, 2004. I appreciate the opportunity to address the matters raised by Senator Leahy. The questions and my responses are enclosed herewith.

Very truly yours,

Neil Vincent Wake

c: The Honorable Patrick J. Leahy
Ranking Member

Responses of Neil Vincent Wake
to Written Questions
from Senator Patrick Leahy

1. Mr. Wake, you told the Arizona Republic, after you were nominated to the federal bench, that you had no plans to discontinue your work as a lawyer representing Republican party interests in federal litigation over Arizona's congressional and legislative districts. What role have you played in the redistricting case since you were nominated by President Bush on October 22, 2003?

Since March 2002 I have been representing a non-profit corporation and individual voters who intervened in legislative and Congressional redistricting litigation in state court and in federal court. My clients represent Republican Party interests in the redistricting litigation. The action concerning legislative redistricting was brought by an organization and individual voters, some of whom are current or former state legislators, who represent Democratic Party interests in the redistricting process. The merits of the federal court litigation were concluded in June 2002, and the only continuing federal litigation is an appeal of the denial of my clients' request for award of attorneys' fees against the State of Arizona, which has not yet been briefed on appeal. The merits of the redistricting litigation have continued in the state court litigation since the summer of 2002.

When I was nominated on October 22, 2003, the trial in the case in state court was set to begin on November 12, 2003. I was the sole trial counsel for my clients, and no one could have replaced me as trial counsel at that time. Under Rule 5.1(a)(2)(C), Arizona Rules of Civil Procedure, I could not have withdrawn unless another attorney certified that he or she would be prepared for trial on that date, which was not possible. Moreover, to have withdrawn in those circumstances would have violated Ethical Rule 1.16(b)(1) since it would have had "material adverse effect on the interests of the client." Rule 42, ER 1.16(b)(1), Rules of the Supreme Court of Arizona.

I tried the case on behalf of my clients from November 12 to December 18, 2003. An adverse judgment was entered January 16, 2004, and like counsel for other affected parties, I filed a notice of appeal. I am now involved in briefing on applications for stay of the judgment pending appeal.

2. If confirmed to the federal district court, will you recuse yourself if this specific issue, or other redistricting cases, come to your courtroom?

If confirmed to the federal district court, I will terminate my representation in this matter, and in all other matters in which I am acting as counsel for any client, as quickly as possible consistent with my ethical duties under Ethical Rule 1.16(b)(1) concerning the manner of withdrawal from pending litigation matters. If any matter were to come before me in a judicial capacity involving the subject matter of the 2002 legislative or Congressional redistricting in Arizona, I believe I would be disqualified and therefore would recuse myself. If other redistricting cases were to come before me in a judicial capacity, I would consider the facts and circumstances and the applicable statutes and regulations to determine whether I should recuse myself. If there were any uncertainty about the proper course of action, I would seek and follow the expert advice available to me from the Administrative Office of the Courts.

3. If confirmed, will you recuse yourself from other matters involving Republican party interests?

If confirmed, I would recuse myself from any matter in which the Republican Party is a party to the same extent that a judge should recuse himself from any matter involving a former client. I understand that calls for recusal as a matter of course for some period of time. Since the relevant circumstances after that, such as the time elapsed since the representation, the nature of the former representation, and the nature of the current matter, may vary, if there were any uncertainty about the proper course of action, I would seek and follow the expert advice available to me from the Administrative Office of the Courts.

SUBMISSIONS FOR THE RECORD

Introduction of Judge Ricardo S. Martinez

Remarks of Sen. Maria Cantwell

January 22, 2004

Mr. Chairman and members of the committee, this morning it is my privilege to introduce you to the incredibly talented nominee for a vacancy on the District Court for the Western District of Washington, Judge Ricardo Martinez.

Judge Martinez has ably served the people of Washington state as a public servant for more than two decades: as a prosecutor in the state's largest county for ten years; as a Superior Court judge for eight years; and as a United States Magistrate Judge in the Western District of Washington for the past five years.

While serving on the King County Superior Court, Judge Martinez took the lead in helping to create an innovative "drug court" to address the unique challenge of recidivism among drug offenders. He helped build a consensus to try a new approach, and presided over the new court for three years.

And it worked. The "drug court," one of the first in the nation, has helped reduce recidivism rates among those people who successfully complete the program and it has been emulated by many jurisdictions across the country.

Judge Martinez's commitment to his community extends beyond the courtroom. He has volunteered countless hours to help those in need and the homeless; to mentor young people as a coach in several sports; and to raise money for college scholarships for young men from disadvantaged backgrounds.

Those who have worked with Judge Martinez attest to his fundamental sense of fairness and justice. The ABA gave him its highest rating – on a unanimous vote. He also enjoys strong support from the federal bench, and was encouraged to apply for the vacancy by all of the incumbent judges of the Western District.

Given Judge Martinez's reputation for even-handedness and thoroughness, it's fitting that he has been recommended by a bipartisan selection committee that I believe is a sound model for other states. Members of Washington state's legal community, the White House, and my colleague Sen. Patty Murray and I worked together to review a group of applicants. Together, we all agreed that Judge Martinez is the right person for the job.

I am pleased to offer Judge Ricardo Martinez my full support, and I urge the members of the committee approve his nomination.

January 22, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the Nominations of

RAYMOND W. GRUENDER TO BE
U.S. CIRCUIT JUDGE FOR THE EIGHTH CIRCUIT;

RICARDO S. MARTINEZ TO BE
U.S. DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON;

GENE E.K. PRATTER TO BE
U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA; AND

NEIL VINCENT WAKE TO BE
U.S. DISTRICT JUDGE FOR THE DISTRICT OF ARIZONA

I am pleased to welcome everyone to the Committee's first confirmation hearing of the Second Session of the 108th Congress. This morning we will hear from four distinguished nominees for the federal judiciary.

Our nominee to the Eighth Circuit Court of Appeals, **Raymond W. Gruender**, has ideal qualifications for the federal bench. An honors graduate of Washington University School of Law, Mr. Gruender has nearly ten years of experience as a trial attorney in private practice, along with a solid record in public service. Since 2001 he has served as U.S. Attorney for the Eastern District of Missouri, where he supervises 60 attorneys in criminal and civil cases. Mr. Gruender and his office have been active in helping to reduce violent crime in the St. Louis area. He has also been a leader in strengthening our nation's readiness in the war on terror. We welcome him to today's hearing, and we look forward to hearing from him.

Judge **Ricardo Martinez** is our nominee for the Western District of Washington, where he currently serves as a magistrate judge. He was a career prosecutor with the King County Prosecuting Attorney's Office before his appointment as a judge on the King County Superior Court in 1990. Since 1998 he has served as a federal magistrate judge – an experience which no doubt has prepared him well for the district court bench.

Our nominee for the Eastern District of Pennsylvania, **Gene Pratter**, has contributed much to the legal community over her 29 year legal career, especially in the areas of legal ethics

and professional conduct. In addition to her responsibilities as a partner with Duane Morris LLP, she serves as a Judge *Pro Tem* on the Philadelphia Court of Common Pleas and as a mediator in federal court. She will be a welcome addition to the federal bench.

Our nominee for the District of Arizona, **Neil Wake**, comes before us today as a highly regarded litigator. After graduating from Harvard Law School, Mr. Wake entered into private practice and became a partner in his firm in just four years. During the next 20 years, he honed his reputation as a highly respected attorney. He has a great deal of appellate experience that spans a wide range of issues, and he should be an outstanding addition to the federal bench.

I look forward to hearing from all of our nominees, and I thank them for appearing before the committee today.

# # #

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Hearing on Judicial Nominations
January 22, 2004

We open this year confronted with three additional disappointing developments regarding judicial nominations: the Pickering recess appointment, the renomination of Claude Allen, and the pilfering of Democratic offices' computer files by Republican staff.

Late last Friday afternoon President Bush made his most cynical and divisive appointment to date when he bypassed the Senate and unilaterally installed Charles Pickering to the U.S. Court of Appeals for the Fifth Circuit. That appointment is without the consent of the United States Senate and is a particular affront to the many individuals and membership organizations representing African Americans in the Fifth Circuit who have strongly opposed this nomination.

With respect to his extreme judicial nominations, President George W. Bush is the most divisive President in American history. Through his extreme judicial nominations, President Bush is dividing the American people and undermining the fairness and independence of the federal judiciary on which all Americans depend.

After fair hearings and open debate, the Senate Judiciary Committee rejected the Pickering nomination in 2002. Originally nominated in 2001 by President Bush, this nominee's record underwent a thorough examination by the Senate Judiciary Committee and was found lacking. Rejected for this promotion by the Committee in 2002 because of his poor record as a judge and the ethical problems raised by his handling of his duties in specific instances, Judge Pickering's nomination was nonetheless sent back to the Senate last year by a President who is the first in our history to reject the judgment of the Judiciary Committee on a judicial nominee. This is the only President who has renominated someone rejected on a vote by the Judiciary Committee for a judicial appointment.

The renomination of Charles Pickering lay dormant for most of last year while Republicans reportedly planned further hearings. Judge Pickering himself said that several hearings on his nomination were scheduled and cancelled over the last year by Republicans. Then, without any additional information or hearings, Republicans decided to forego any pretense at proceeding in regular order. Instead, they placed the name of Judge Pickering on the Committee's markup agenda and pushed his nomination through with their one-vote majority. The Committee had been told since last January that a new

hearing would be held before a vote on this nomination, but that turned out to be an empty promise.

Why was the Pickering nomination moved ahead of other well-qualified candidates late last fall? Why was the Senate required to expend valuable time rehashing arguments about a controversial nomination that has already been rejected? The timing was arranged by Republicans to coincide with the gubernatorial election in Mississippi. Like so much about this President's actions with respect to the federal courts, partisan Republican politics seemed to be the governing consideration. Indeed, as the President's own former Secretary of the Treasury points out from personal experience, politics governs more than just federal judicial nominations in the Bush Administration.

Charles Pickering was a nominee rejected by the Judiciary Committee on the merits – a nominee who has a record that does not qualify him for this promotion, who injects his personal views into judicial opinions, and who has made highly questionable ethical judgments. The nominee's supporters, including some Republican Senators, have chosen to imply that Democrats opposed the nominee because of his religion or region. That is untrue and offensive. These smears have been as ugly as they are wrong. Yet the political calculation has been made to ignore the facts, to seek to pin unflattering characterizations on Democrats for partisan purposes and to count on cynicism and misinformation to rule the day. With elections coming up this fall, partisan Republicans are apparently returning to that page of their partisan political playbook.

Never before had a judicial nomination rejected by the Judiciary Committee after a vote been resubmitted to the Senate, but this President took that unprecedented step last year. Never before has a judicial nomination debated at such length by the Senate, and to which the Senate has withheld its consent, been the subject of a presidential appointment to the federal bench.

In an editorial following last week's appointment, *The Washington Post* had it right when it summarized Judge Pickering's record as a federal trial judge as "undistinguished and downright disturbing." As the paper noted: "The right path is to build consensus that nonpartisanship and excellence are the appropriate criteria for judicial selection." Instead we see another dangerous step down the Republican's chosen path to erode judicial independence for the sake of partisanship and their ideological court-packing efforts. *The New York Times* also editorialized on this subject and it, too, was correct when it pointed out that this end-run around the advice and consent authority of the Senate is "absolutely the wrong choice for one of the nation's most sensitive courts."

Civil rights supporters who so strenuously opposed this nominee were understandably offended that the President chose this action the day after his controversial visit to the grave of Dr. Martin Luther King Jr. As the nation was entering the weekend set aside to honor Dr. King and all for which he strived, this President made one of the most insensitive and divisive appointments of his Administration.

So many civil rights group and individuals committed to supporting civil rights in this country have spoken out in opposition to the elevation of Judge Pickering that their views should have been respected by the President. Contrary to the false assertion made by *The Wall Street Journal* editorial page this week, the NAACP of Mississippi did not support Judge Pickering's nomination. Indeed, every single branch of the Mississippi State Chapter of the NAACP voted to oppose this nomination -- not just once, but three times. When Mr. Pickering was nominated to the District Court in 1990, the NAACP of Mississippi opposed him, and when he was nominated to the Fifth Circuit in 2001 and, again, in 2003, the NAACP of Mississippi opposed him. They have written letter after letter expressing their opposition. That opposition was shared by the NAACP, the Southern Christian Leadership Conference, the Magnolia Bar Association, the Mississippi Legislative Black Caucus, the Mississippi Black Caucus of Local Elected Officials, Representative Bennie G. Thompson and many others. Perhaps *The Wall Street Journal* confused the Mississippi NAACP with the Mississippi Association of Trial Lawyers, which is an organization that did support the Pickering nomination.

This is an Administration that promised to unite the American people but that has chosen time and again to act with respect to judicial nominations in a way that divides us. This is an Administration that squandered the goodwill and good faith that Democrats showed in the aftermath of September 11, 2001. This is an Administration that refused to acknowledge the strides we made in filling 100 judicial vacancies under Democratic Senate leadership in 2001 and 2002 while overcoming anthrax attacks and in spite of Republican mistreatment of scores of qualified, moderate judicial nominees of President Clinton.

Then, just two days ago, the President sent the nomination of Claude Allen back to the Senate. From the time this nomination was originally made to the time it was returned to the President last year, the Maryland Senators have made their position crystal clear. This Fourth Circuit vacancy is a Maryland seat and ought to be filled by an experienced, qualified Marylander. Over the Senate recess, the White House had ample time to find such a nominee, someone of the caliber of sitting U.S. District Court Judges Andre Davis, or Roger Titus, two former Maryland nominees whose involvement in the state's legal system and devotion to their local community was clear. This refusal to compromise is just another example of the White House engaging in partisan politics to the detriment of an independent judiciary.

The third disappointment we face is the ongoing fallout from the cyber theft of confidential memoranda from Democratic Senate staff. This invasion was perpetrated by Republican employees both on and off the Committee. As revealed by the Chairman, computer security was compromised and, simply put, members of the Republican staff took things that did not belong to them and passed them around and on to people outside of the Senate. This is no small mistake. It is a serious breach of trust, morals, and possibly the rules and regulations governing the U.S. Senate. We do not yet know the full extent of these violations. But we need to repair the loss of trust brought on by this breach of confidentiality and privacy, if we are ever to recover and be able to resume our work in a spirit of cooperation and mutual respect that is so necessary to make progress.

Democratic cooperation with the President's slate of judicial nominees has been remarkable in these circumstances. One way to measure that cooperation and the progress we have made possible is to examine the Chief Justice's annual report on the federal judiciary. Over the last couple of years, Justice Rehnquist has been "pleased to report" our progress on filling judicial vacancies. This is in sharp contrast to the criticism he justifiably made of the shadowy and unprincipled Republican obstruction of consideration of President Clinton's nominees. In 1996, the final year of President Clinton's first term, the Republican-led Senate confirmed only 17 judicial nominees all year and not a single nominee to the circuit courts. At the end of 1996, the Republican Senate majority returned to the President almost twice as many nominations as were confirmed.

By contrast, with the overall cooperation of Senate Democrats, which partisan Republicans are loathe to concede, this President has achieved record numbers of judicial confirmations. Despite the attacks of Sept. 11 and their aftermath, the Senate has already confirmed 169 of President Bush's nominees to the federal bench. This is more judges than were confirmed during President Reagan's entire first four-year term. Thus, President Bush's three-year totals rival those achieved by other Presidents in four years. That is also true with respect to the nearly four years it took for President Clinton to achieve these results following the Republicans' taking majority control of the Senate in 1995.

The 69 judges confirmed last year exceeds the number of judges confirmed during *any* of the six years from 1995 to 2000 that Republicans controlled the Senate during the Clinton presidency years in which there were far more vacant federal judgeships than exist today. Among those 69 judges confirmed in 2003 were 13 circuit court judges. That exceeds the number of circuit court judges confirmed during *all* of 1995, 1996, 1997, 1999, and 2000, when a Democrat was President.

The Senate has already confirmed 30 circuit court judges nominated by President Bush. This is a greater number than were confirmed at this point in the presidencies of his father, President Clinton, or the first term of President Reagan. Vacancies on the federal judiciary have been reduced to the lowest point in two decades and are lower than Republicans allowed at any time during the Clinton presidency. In addition, there are more federal judges serving on the bench today than at any time in American history.

I congratulate the Democratic Senators on the Committee for showing a spirit of cooperation and restraint in the face of a White House that so often has refused to consult, compromise or conciliate. I regret that our efforts have not been fairly acknowledged by partisan Republicans and that this Administration continues down the path of confrontation. While there have been difficult and controversial nominees whom we have opposed as we exercise our constitutional duty of advice and consent to lifetime appointments on the federal bench, we have done so openly and on the merits.

For the last three years I have urged the President to work with us. It is with deep sadness that I see that this Administration still refuses to accept the Senate's shared responsibility under the Constitution and refuses to appreciate our level of cooperation and achievement.

I also note the Chief Justice's disappointment that this Administration has failed to support our third co-equal branch, the federal judiciary, with respect to fair compensation or to respect its judicial authority. I, too, was troubled by the Feeney Amendment that was added by Republicans at the last minute to important child protection legislation. The Chief Justice's criticisms on these matters are amply justified.

Today, the Chairman has scheduled hearings on four more judicial nominees: one for the United States Circuit Court of Appeals for the Eighth Circuit, and three for United States District Courts in Washington, Pennsylvania and Arizona. I welcome the nominees and their families to the Committee.

Included among the nominees today is Raymond Gruender, nominated to the U.S. Court of Appeals for the Eighth Circuit. President Clinton's nomination of Bonnie Campbell to this court was blocked by a secret Republican hold from ever getting Committee or Senate consideration. By contrast, the Senate has already confirmed four of President Bush's nominees to this circuit -- William Riley, Michael Melloy, and Lavenski Smith were confirmed while Democrats held the majority and, last year, Steven Colloton was confirmed to this court, as well.

For the past two years, Mr. Gruender has served as the U.S. Attorney for the Eastern District of Missouri. In this capacity, he has been a strong defender of Attorney General John Ashcroft's aggressive and controversial tactics. I will be glad to afford him the opportunity to expound his views on a number of issues.

Today, we will also hear from Gene Pratter, nominated to the U.S. District Court for the Eastern District of Pennsylvania. She will be the fourteenth nominee of President Bush's to the U.S. district courts in Pennsylvania who is being given a hearing. While I was Chairman, the Senate held hearings for and confirmed 10 nominees to the district courts in Pennsylvania. President Bush's nominees have been treated far better than President Clinton's were. Indeed, there is no State in the Union that has had more federal judicial nominees confirmed by this Senate than Pennsylvania.

Despite the best efforts of the senior Senator from Pennsylvania, there were nine nominees by President Clinton to Pennsylvania vacancies who were never considered. Despite their qualifications, those nominations sat pending for extensive periods of time without action. Ms. Pratter was just nominated on Nov. 3, 2003 and is another nominee by President Bush who, by contrast, is being accorded a prompt hearing.

We want to comment briefly, as well, on the nomination of Judge Ricardo Martinez. This nomination from Washington State has the support of both home-state Senators. Senator Murray and Senator Cantwell have both worked hard to establish a bipartisan

process for making recommendations to the President for federal judicial vacancies in their State. They are to be commended for their work. Judge Martinez is the third Washington State nominee who is a product of Washington's bipartisan selection commission, and appears to be another well-qualified, consensus nominee. This shows what can be achieved if the Administration will work with us.

# # # # #

NOMINATION OF FRANKLIN S. VAN ANTWERPEN, OF PENNSYLVANIA, NOMINEE TO BE CIRCUIT JUDGE FOR THE THIRD CIRCUIT

WEDNESDAY, JANUARY 28, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter presiding.

Present: Senator Specter.

Senator SPECTER. Good morning, ladies and gentlemen. The Committee on the Judiciary will now proceed with the President's nomination of Hon. Franklin S. Van Antwerpen to be United States Circuit Judge for the Third Circuit.

My distinguished colleague, Senator Santorum, is present and I will call on him first before making any comments as Chairman to minimize his time and make a presentation.

Senator SANTORUM. I appreciate that. I usually yield to my senior colleague, so I will, in turn, reverse back to you, Senator, and certainly always enjoy listening to any comments that you have on matters dealing with Pennsylvania, in particular.

PRESENTATION OF FRANKLIN S. VAN ANTWERPEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE THIRD CIRCUIT, BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Well, we have a very talented jurist who has been nominated for promotion from the United States District Court to the Court of Appeals for the Third Circuit.

Judge Van Antwerpen has is bachelor's degree from the University of Maine, his law degree from Temple. He was a corporate lawyer for a time. He worked with the Northampton County Legal Aid Society. He was a partner in a law firm. He was on the Common Pleas Court from 1979 to 1987, and from 1987 to the present time he has been on the United States District Court for the Eastern District of Pennsylvania.

I have come to know Judge Van Antwerpen very well. He is a highly respected jurist. He has been very active in his community and he brings the combination of education, academic skills, practical experience. Very important, his work on the Legal Aid Society, and he has done an outstanding job on the Federal district court.

It is a relative rarity to be promoted to the Court of Appeals for the Third Circuit, but when the vacancy arose Senator Santorum and I conferred. We have made a practice of having a bipartisan nominating panel. We have worked very hard on the selection of Federal judges because of the importance of the position.

Since *Marbury* v. *Madison*, the Federal courts control the ultimate questions in our society, and the Supreme Court of the United States makes the decisions on all of the cutting-edge issues. And the Supreme Court, of course, can only reach so many cases, which means that the courts of appeals are the final arbiters of many, many very vital issues for our country.

The proposed constitutional amendment which I have had in mind has not gone very far when I have suggested that Federal judges run every 6 years and Senators serve for life. So we have the situation where the lifetime appointments are of such great importance. So Senator Santorum and I were really delighted when the President followed our recommendation and submitted Judge Van Antwerpen's name to the Judiciary Committee.

Senator Santorum.

PRESENTATION OF FRANKLIN S. VAN ANTWERPEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE THIRD CIRCUIT, BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Mr. Chairman, and I too want to thank the President for following our recommendation and selecting Judge Van Antwerpen for this position. He has been rated unanimously well-qualified by the ABA, which is not necessarily my gold standard, but I think reflects at least some body of thought that he has done an outstanding job in his role as a judge in the Eastern District of Pennsylvania. As you mentioned, he was unanimously confirmed by the United States Senate for that position and has served with great distinction.

I know the judge is sitting back there saying, where is everybody? And I would just suggest that the fewer, the better, and that the relationship of the number of people sitting with Senator Specter to the likelihood of confirmation is an inverse relationship.

And so the fact that you don't see anybody out there lining up to question all but guarantees your confirmation as far as I am concerned. But it is so because of your outstanding work on the bench.

This is a nominee that I know Senator Specter and I are very, very excited about, comfortable with, and I think would be a great addition to the Third Circuit. Senator Specter went through his qualifications, so I don't need to do so. I just want to thank him for his willingness to serve in the judiciary, and particularly for his name being placed in nomination.

This has been a rough road for many, but I am hopeful that because of your outstanding service and your distinguished record that you will have much success here, not only in Committee but when it gets to the floor.

I want to commend my colleague, in particular, who if Republicans stay in control is scheduled to be the next Chairman of this

Committee, for the work that he has done in working, as he mentioned, in a bipartisan fashion.

We have had 15 nominees since President Bush took office and we are 15-for-15 in getting our nominees confirmed. I think that shows that we have worked together in a good spirit and put very qualified people here before the Committee.

That is to your credit, Senator Specter, and your leadership on that particular issue.

Thank you, Mr. Chairman.

Senator SPECTER. Well, thank you very much, Senator Santorum. I think the comment you made about 15-for-15 is a very important comment. The Constitution provides, beyond consent, confirmation by the Senate, advise and consent. The President has listened to our recommendations and we have put forward nominees who have met with universal approval. So that is what we intend to keep doing.

Thank you very much, Senator Santorum.

Judge Van Antwerpen, if you would step forward and raise your right hand?

Do you swear that the testimony that you are about to give before this Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Judge VAN ANTWERPEN. Yes, Senator, I do.

Senator SPECTER. As a United States District Judge for the Eastern District of Pennsylvania, you have had extensive experience as a Federal judge. How has that experience shaped your views on the proper role of a Federal judge within our legal, judicial, political system?

STATEMENT OF FRANKLIN S. VAN ANTWERPEN, NOMINEE TO BE CIRCUIT JUDGE FOR THE THIRD CIRCUIT

Judge VAN ANTWERPEN. Senator, I believe that the proper role of a judge is to interpret the law and to apply the law. The role of the other branches, the Congress, in particular, of course, is to formulate policy in the law. Sometimes, the executive branch promulgates administrative rules and regulations.

We in the judiciary take that law and take those regulations and apply them to given fact situations. I also believe that the role of a judge is to take very seriously his oath in doing equal justice to everyone, rich and poor, and to try to have judicial temperament and preside fairly in all matters.

[The biographical information of Judge Van Antwerpen follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Franklin Stuart Van Antwerpen.

2. Address: List current place of residence and office address(es).

OFFICES: 17613 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

The Holmes Building
4th Floor
101 Larry Holmes Drive
Easton, PA 18042

(Use Easton Office for all correspondence)

HOME: Easton, PA 18045

3. Date and place of birth.

October 23, 1941, Passaic, New Jersey.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married to Kathleen V. O'Brien. She is not employed outside the home.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of Maine, 1960-1964, B.S. in Engineering and Physics, granted June 5, 1964.

Temple University School of Law, 1964-1967, J.D., granted June 15, 1967.

National College of the Judiciary, University of Nevada, Reno, Nevada. Graduate of Full General Jurisdiction Session 1980. No degrees are awarded.

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1964-1967. No full time employment while in law school, I did serve a clerkship with the firm of Jenkins & Acton, 140 East Butler Pike, Ambler, PA.

1967-1968. Administrative Assistant to the Director of Advanced Planning, Hazeltine Corporation.

1968-1970. Corporate Law Department, Hazeltine Corporation, Greenlawn, L.I., New York 11740. Served as contracts lawyer.

1970-1971. Chief Counsel, Northampton County Legal Aid Society, now known as North Penn Legal Services, Inc., 65 East Elizabeth Avenue, Suite 903, Bethlehem, PA 18018 . Served as full-time legal aid lawyer.

1971-1979. Hemstreet, Smith and Van Antwerpen, 7th and Washington Streets, Easton, PA 18042. Served as an associate from 1971-1973 and as a partner 1973-1979 in the general practice of law with a sub-specialty in municipal law. The firm no longer exists.

1979-1987. Judge, Court of Common Pleas of Northampton County, PA, County Courthouse, 7th and Washington Streets, Easton, PA, 18042.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No active military service. From 1960-1962, I served in college U.S. Army Basic R.O.T.C. with rank of Cpl.; no serial numbers were issued. In 1967, I passed tests to serve as a U.S. Navy Air Intelligence Officer (Ens.), but I did not serve because of my civilian job position at Hazeltine Corporation.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

At the University of Maine I was an associate member of Sigma Pi Sigma, Physics Honor Society.
At Temple University School of Law, because of my top quarter class rank at the end of first year, I was selected as a Freshman Advisor and as a Justice of the Moot Court.
Listed in *Who's Who in America* since 1990.

1990 Law Enforcement Commendation Medal, National Society of the Sons of the American Revolution.
Newark Academy Alumni Achievement Award.
Unanimously found well qualified by ABA for U.S. District Court in 1987 and in 1991 for U.S. Court of Appeals for the Third Circuit.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Member of Federal Judges Association.
Member of Federal Bar Association.
Member of the Federal Circuit Bar Association.
Member of American Bar Association.
Member of Pennsylvania Bar Association.
Member of Northampton County Bar Association.
Member of Defender Services Committee, Judicial Conference of the U. S. Chairman Sub-Committee on Federal Defender Funding 2000-2001.
Former Member of American Judicature Society.
Former Member of Pennsylvania Conference of State Trial Judges.
Former Member of American Trial Lawyers Association.
Former Member of Federal Judges Association Committee on Legislation.
Former Member of American Bar Association Committee on Judicial Education.
Former Member of State Trial Judges Judicial Code Committee.
Former Member of Northampton County Bar Association Fee Dispute Committee and Continuing Education Program.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I am not a member of any organization engaged in lobbying.
I am a member of:
The Union League of Philadelphia, Philadelphia, PA.
The Pomfret Club, Easton, PA.
Northampton County Historical Society., Easton, PA.
National Lawyers Club, Washington, D.C.
The Pennsylvania Society, Sellersville, PA.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for

any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States, May 22, 1972.
U. S. Court of Appeals for the Third Circuit, May 7, 1971.
U. S. District Court for the Eastern District of Pennsylvania, January 6, 1971.
Pennsylvania Supreme Court, April 28, 1969.
Pennsylvania Superior Court, June 13, 1969.
Pennsylvania Commonwealth Court, November 30, 1970.
Court of Common Pleas of Northampton County, August 17, 1970.

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

There are no speeches on constitutional law or legal policy other than published legal opinions. The only exception I can think of is a commencement speech I gave at Moravian Academy on June 9, 2001 in which I stated that the Federal Courts have done an important job in safeguarding free speech and striking down segregation. A copy of this speech is attached. The citation for the only article I wrote is: Franklin Van Antwerpen, *Plugging Leaks in the Dike: A Proposal For the Use of Supplemental Opinions in Federal Appeals*, 20 Cardozo Law Review 1233 (1999). The article dealt with the need for supplemental opinions which lower courts could write when an appeal is taken.

It is my practice not to make many speeches, and when I do I avoid taking a position on constitutional law, legal policy, and political or controversial subjects. All my speeches are extemporaneous, with the exception of the commencement speech and speeches to the Easton Kiwanis Club, a eulogy for a deceased judge, and a speech honoring a fellow federal judge on Law Day. Copies of all these written speeches are attached. When I was a Judge of the Court of Common Pleas, I gave brief remarks on Memorial Day to several veterans' groups. I do not know the exact years of these speeches and they were not written down. The gist of the remarks was that we all owe a great debt of gratitude

to veterans and those who have made the ultimate sacrifice. I also spoke in February, 2000 at the retirement dinner of a woman who had worked with me when I was Solicitor of Palmer Township in the 1970s. I reminisced about the excellent job she had done in building a municipal bikeway and equipping the township with sanitary sewers, storm sewers, a water system and a new municipal complex. I thanked her for her public service. Sometime in the early 1990s I gave a similar speech for another township employee who retired and is now deceased.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. My last physical examination was on October 13, 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

United States District Judge, Eastern District of Pennsylvania. Nominated by President Ronald Reagan in September 1987 and confirmed by the U.S. Senate on December 9, 1987. Sworn in December 21, 1987. Federal Courts are courts of limited jurisdiction.

Judge, Court of Common Pleas of Northampton County (Third Judicial District). Selected by Non-Partisan Merit Selection Committee, nominated by Governor Thornburgh, and confirmed, unanimously, by Pennsylvania Senate in 1979. Sworn in as judge in 1979. Received endorsement of both political parties in 1981 and elected without opposition to a full ten-year term. The Court of Common Pleas is a general jurisdiction trial court of record which hears all types of cases, both civil and criminal.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed

were not officially reported, please provide copies of the opinions.

1. TEN MOST SIGNIFICANT OPINIONS:

a) **United States v. Scarfo**, 711 F.Supp. 1315 (E.D. Pa. 1989), aff'd 910 F.2d 1084 (3d Cir. 1990), cert. denied, 59 U.S.L.W. 3769 (1991). Landmark Mafia-organized crime case in which seventeen Mafia members, including the "Godfather Scarfo" and "Underboss Leonetti," were all tried simultaneously and convicted in a four-month trial. All were given length prison sentences. The case received nationwide coverage and has been the subject of two television documentaries and three books. See, e.g., D. Cox, Mafia Wipeout (1990).

b) **United States v. Vastola**, 25 F.3d 164 (3d Cir. 1994) (Van Antwerpen, J. sitting by designation), cert. denied 513 U.S. 1015 (1994). In an opinion written by Judge Van Antwerpen, the Third Circuit Court of Appeals rejected appellant's argument for suppression of wiretap recordings improperly sealed under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. Although the Government attorney's failure to timely seal the surveillance tapes constituted an unreasonable error of law, she acted prudently in reaching this misunderstanding. Accordingly, the court affirmed the trial court's denial of appellant's request to overturn his convictions under the RICO statute.

c) **United States v. Schiffer**, 798 F.Supp. 1128 (E.D. Pa. 1992) (not appealed). The Government brought a civil action to revoke Defendant's citizenship pursuant to 8 U.S.C. § 1451(a). Defendant was born in the United States, but at age one moved to Rumania with his parents. He entered the Rumanian Army and swore allegiance to the King of Rumania. Defendant thereafter joined the Nazi Waffen-SS and swore allegiance to Adolf Hitler. While a member of that organization, Defendant served as an army guard at three concentration camps in Germany and German-occupied Poland, and participated in the persecution of various civil groups. Defendant subsequently returned to the United States where he was issued a Certificate of Naturalization. The court denied Defendant's Motion to Dismiss.

Next, the court held that Defendant voluntarily relinquished his birth-acquired United States citizenship through his performance of an expatriating act, and that his naturalized citizenship was procured by concealment and misrepresentation. **United States v. Schiffer**, 831 F.Supp. 1166 (E.D. Pa. 1993), aff'd 31 F.3d 1175 (3d Cir. 1994). Defendant failed to reveal his Waffen-SS membership on his naturalization application.

Finally, the court denied defendant's motion for a new trial. See **United States v. Schiffer**, 836 F.Supp. 1164 (E.D. Pa. 1993), aff'd, 31 F.3d 1175 (3d Cir. 1994). The court held that defendant failed to comply with a Local Rule when he neglected to order a transcript within ten days of making a post-trial motion and that, in any case, defendant was not entitled to a new trial on the grounds alleged because he failed to raise them at trial. Moreover, the court found the grounds were meritless because there was no support for the claims that the Constitution or international legal principles protect him from expatriation.

d) **O'Keefe v. Mercedes-Benz USA, LLC**, 214 F.R.D. 266 (E.D. Pa. 2003) (not appealed). Judge Van Antwerpen certified a large class of vehicle purchasers and lessees from the state of Pennsylvania. Plaintiff class initially filed suit in state court, alleging violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Laws, breach of express and implied warranties, fraudulent concealment, and seeking declaratory relief. Upon finding that diversity of citizenship requirements were met, the court deemed removal to be proper, certified the Plaintiff class, and determined that proposed settlement was adequate, fair, and reasonable.

e) **Simmons v. City of Philadelphia**, 728 F.Supp. 352 (E.D. Pa. 1990), aff'd 947 F.2d 1042 (3d Cir. 1991), cert. denied 503 U.S. 985 (1992). After being taken in custody and detained by Philadelphia police for public intoxication, plaintiff was subsequently discovered hanging from his cell. Upon being found to have violated plaintiff decedent's constitutional rights, pursuant to 42 U.S.C. § 1983, and further being found negligent, Defendant City of Philadelphia moved for a judgment notwithstanding the verdict and for a new trial. In denying Defendant's request for post-trial relief, the court held that the evidence supporting the

jury's finding that the city violated plaintiff decedent's constitutional rights was sufficient, that the jury verdict was not inconsistent, and that the city waived its governmental immunity.

f) **White as next of friend to Heidnik v. Horn**, 960 F.Supp. 74 (E.D. Pa. 1997); 54 F.Supp.2d 457 (E.D. Pa. 1999). The petitioner sought a stay of execution as next friend on behalf of her father, Gary Heidnik. The court determined that Heidnik was competent to waive his right to appeal and therefore petitioner failed to establish next friend standing. Consequently, the petition for the stay of execution was denied. This decision was reversed by the Third Circuit, 112 F.3d 105 (3d Cir. 1997), but was affirmed by the United States Supreme Court, which denied the stay. See White v. Horn, 527 U.S. 1050 (1999).

g) **Levan v. United States**, 128 F.Supp.2d 270 (E.D. Pa. 2001) (not appealed). Defendant sought to set aside his sentence for conspiracy to manufacture methamphetamine. The court held that Apprendi v. New Jersey, 530 U.S. 466 (2000), (requiring that any fact that would increase a penalty for a crime beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt) does not apply retroactively to cases on collateral review.

h) **Rivera v. Reading Housing Authority**, 819 F.Supp. 1323 (E.D. Pa. 1993), aff'd 8 F.3d 961 (3d Cir. 1993). Plaintiff challenged the Reading Housing Authority's (RHA's) policy requiring applicants under the age of eighteen (18) to provide a judicial decree of emancipation. The court granted defendant's motion for summary judgment, holding that the policy did not violate the U.S. Housing Act of 1937, HUD regulations, or the due process clause of the Fourteenth Amendment.

I) **First and First, Inc. v. Dunkin Donuts, Inc.**, 1990 U.S. Dist. LEXIS 7432 (E.D. Pa., filed March 27, 1990). Two international doughnut chains sought to merge. Suppliers of one chain sought an injunction barring the merger. The court initially halted the merger but ultimately handed down a 208-page opinion finding a broad relevant market and denied a preliminary injunction. The legal discussion was written entirely by the Judge in seven days.

j) **Southeastern Pennsylvania Transp. Auth. v. International Ass'n. of Machinists & Aerospace Workers**, 708 F.Supp. 659 (E.D. Pa. 1989), aff'd, 882 F.2d 778 (3d Cir. 1989). Thirty-seven transportation unions sought to engage in a sympathy strike to halt ground transportation by honoring secondary picket lines of striking Eastern Airlines machinists and aerospace workers. The Judge wrote the entire opinion himself in less than twenty-four hours and issued a preliminary injunction under the collective bargaining agreements and minor dispute procedures of the Railway Labor Act.

2. **APPELLATE REVERSALS:**

The following cases pertain to my service as a state court judge from 1979-1987:

a) **Fike v. Brynildsen**, 68 Pa. Commw. 514, 449 A.2d 856 (1982). The Commonwealth Court vacated the Court of Common Pleas review of a zoning hearing board decision and remanded so the zoning hearing board could make a better record.

b) **Fritchman v. Fritchman**, 311 Pa. Super. 622, 458 A.2d 279 (1983). The Superior Court affirmed per curiam the Court of Common Pleas award of custody, but modified the lower court's order to allow immediate visitation prior to counseling.

c) **Columbian Rope Co. V. Rinek Cordage Co.**, 314 Pa. Super. 585, 461 A.2d 312 (1983). The Superior Court affirmed part of the Court of Common Pleas decision but, in a matter of first impression in Pennsylvania, the Superior Court disregarded a Federal Western District of Pennsylvania Court decision and adopted the view that the term "concealed" in the Bulk Sales law means the same thing as "undisclosed."

d) **Commonwealth ex rel. Rita L. Falwell v. A. S. DiGiacinto, Warden**, 324 Pa. Super. 200, 471 A.2d 533 (1984). The Superior Court reversed a Court of Common Pleas finding of contempt when a defendant charged with willful failure to pay child support came into a crowded courtroom drunk. The District Attorney forgot to defend this case on appeal.

e) **Gallo v. J.C. Penney Casualty Ins. Co.**, 328 Pa. Super. 267, 476 A.2d 1322 (1984). The Superior Court reversed the Court of Common Pleas legal interpretation of the term "motor vehicle" in an insurance contract and held that the term also includes snowmobiles.

f) **Commonwealth v. Hatch**, 343 Pa. Super. 610, 494 A.2d 480 (1985). The Superior Court reversed a jury conviction of aggravated assault and carrying unlicensed firearms because one of the policemen who arrested the defendant was outside his usual jurisdiction. After remand and suppression of evidence seized at the time of arrest, defendant was re-tried and again found guilty. In later decisions, the Superior Court has decided consistent with the Court of Common Pleas that extra-territorial arrests do not require suppression of evidence because constitutional rights are not involved.

g) **Commonwealth v. Pemberth**, 339 Pa. Super. 428, 489 A.2d 235 (1985). Defendant was found not guilty by a jury of theft, but convicted of a lesser included offense of unauthorized use of a motor vehicle. The Superior Court declined to follow the well-known dicta of its earlier decisions and held for the first time that unauthorized use of a motor vehicle is not a lesser included offense of theft.

h) **Gable v. Remington Arms Co., Inc.**, 97 Pa. Commw. 180, 510 A.2d 153 (1986). The Commonwealth Court, in a matter of legal interpretation of a statute making official Department of Transportation accident investigations inadmissible in legal actions, held that such investigations may nevertheless be reviewed on discovery. No precedent existed at the time of the decision of the Court of Common Pleas and the case upon which the Superior Court relied upon was decided after the lower court made its decision.

I) **Wambold v. Erie Insurance Co.**, 356 Pa. Super. 598, 512 A.2d 58 (1986). The Superior Court held as a matter of law that an insurance company is not responsible for paying uninsured motorist coverage if the insured has settled a bodily injury claim without the knowledge of the company. The court said, "Since the (decision on which we rely) came down after Judge Van Antwerpen's

decision, the trial court did not have the benefit of such authority."

j) **Parkinson v. Parkinson**, 354 Pa. Super. 419, 512 A.2d 20 (1986). The Superior Court reversed the Court of Common Pleas acceptance of the recommendation of a hearing officer and award of support. The Superior Court held that the amount credited to appellee for income tax withholding was too high because appellee's actual taxes are less than the amount of withholding.

k) **Moffit v. Moffit**, 356 Pa. Super. 142, 514 A.2d 184 (1986). The Superior Court held that the Court of Common Pleas was incorrect in deciding that Florida, where a child lived, rather than Pennsylvania, should have jurisdiction in a Uniform Child Custody Jurisdiction Act matter. The Appellate Court carefully distinguished the existing case law upon which the lower court relied.

l) **Gallo v. Yamaha Motor Corp.**, 363 Pa. Super. 308, 526 A.2d 359 (1987), appeal denied, 517 Pa. 623, 538 A.2d 876 (1988). (Petition to Appeal to Pennsylvania Supreme Court filed May 1987). The Superior Court reversed a substantial jury award of damages and held that the Court of Common Pleas should not have held that a state statute which would have prevented plaintiff from recovering did not apply in this case.

The following cases pertain to my service as a federal judge from 1987 to the present:

m) **Tyahla v. Andrew Warren, et al.**, No. 89-07221 (E.D. Pa. filed Feb. 5, 1990), rev'd, 958 F.2d 365 (3d Cir. 1992). The Third Circuit vacated the district court's decision to dismiss a complaint when plaintiff failed to timely respond to defendant's motion to dismiss. The court held that the Local Rule permitting dismissal in the absence of timely response was inconsistent with the Federal Rules of Civil Procedure. The Third Circuit's decision was pursuant to opinions that were issued by it subsequent to the district court's grant of summary judgment.

n) **United States v. Fotopoulos**, No. 90-00184-01 (E.D. Pa. filed Jan. 28, 1991), rev'd, 937 F.2d 599 (3d Cir. filed June 6, 1991). This case was affirmed by the

Third Circuit, but LexisNexis mistakenly states it was vacated and remanded. 937 F.2d 599 (3d Cir. 1991).

o) **United States v. Tsai**, No. 90-00030-02 (E.D.Pa.), aff'd in part, rev'd in part, 954 F.2d 155 (3d Cir. 1992). The Third Circuit affirmed defendant's conviction for violating the Arms Export Control Act (AECA), but vacated the sentence imposing an upward departure from the Sentencing Guidelines. The court held that the threat of national security could not be considered an aggravating circumstance which would warrant an upward departure since the AECA itself contemplates threats to national security.

p) **United States v. Toth**, 1994 U.S. Dist. LEXIS 13494 (E.D.Pa. 1994), aff'd in part, rev'd in part, 1992 U.S. App. LEXIS 31547 (3d Cir. 1992). The Third Circuit affirmed the judgment against defendant, but reversed the district court's sentence calculation. The court found that the 1987 Drug Equivalency Table should have been used to calculate the sentence, instead of the more onerous 1989 Drug Equivalency Table because the evidence showed the defendant's involvement in the conspiracy ended in 1988.

q) **Kershentsev, et al. v. Mascotte Productions, Inc.**, et al., 781 F. Supp. 339 (E.D.Pa. 1991), aff'd in part, rev'd in part, 981 F.2d 1247 (3d Cir. 1992). The Third Circuit found that two of the defendants in the case had not received sufficient notice of the claims against them and could not have properly defended themselves at the hearing. For that reason, the injunction entered against them was improper.

r) **Ritter v. Diasonic, Inc.**, 1992 U.S. Dist. LEXIS 10816 (E.D.Pa. 1992), rev'd, 993 F.2d 225 (3d. Cir. 1993). The Third Circuit reversed the district court's decision to deny a stay pending arbitration. The court disagreed with the district court's conclusion that defendant's conducting five months of discovery in preparation for trial waived the right to arbitrate plaintiff's claim.

s) **Sawka v. Healtheast, Inc.**, 1990 U.S. Dist. LEXIS 4321 (E.D.Pa. 1990), aff'd in part, rev'd in part, 989 F.2d 138 (3d Cir. 1993). The Third Circuit affirmed the district court's decision not to reinstate plaintiff's action, but vacated the decision to enforce the

settlement agreement. The court held that since the district court had not retained jurisdiction over the settlement agreement when it dismissed the case, it could not then enforce it.

t) **United States v. Mastros**, No. 91-00522-01 (E.D. Pa.), rev'd, 998 F.2d 1006 (3d Cir. 1993). The Third Circuit held that the district court's application of the 1989-amended Sentencing Guidelines to defendant's firearms offenses violated ex post facto principles because it imposed a higher sentence than would have been applicable at the time of the offense. The Third Circuit's opinion reflected a decision it issued subsequent to the district court's decision, which rejected the application of one set of Guidelines to offenses that occurred at different times.

u) **United States v. Premises Known as 717 S. Woodward St.**, 804 F. Supp. 716 (E.D.Pa. 1992), rev'd, 2 F.3d 529 (3d Cir. 1993). The Third Circuit reversed the district court's order granting summary judgment on the grounds that a genuine issue of material fact existed as to whether the homeowner knew of or consented to her husband's drug activities at the home which had been forfeited.

v) **United States v. Curran**, 1993 U.S. Dist. LEXIS 7756 (E.D.Pa. 1993), rev'd, 20 F.3d 560 (3d Cir. 1994). The Third Circuit vacated defendant's conviction for causing election campaign treasurers to submit false reports to the Federal Election Commission (FEC). The court remanded for a new trial in which the jury was to be instructed that although the campaign treasurers had a duty to disclose the false reports, the defendant did not.

w) **Clewell v. Upjohn Co.**, 1995 U.S. Dist. LEXIS 17988 (E.D.Pa. 1995), rev'd, 1995 U.S. App. LEXIS 14846 (3d Cir. 1995). The Third Circuit reversed the district court's decision denying plaintiffs' motion to proceed pro se and dismissing the complaint.

x) **United States v. Pungitore**, No. 88-00003-19 (E.D. Pa. filed Dec. 29, 1994), rev'd, 68 F.3d 458 (3d Cir. 1995). The Third Circuit vacated the district court's dismissal of a pro se habeas petition. The opinion instructed the district court to permit amendment of the petition to include claims that were raised in the

initial appeal, when petitioner alleged he was inadequately represented by counsel that was a close associate of counsel representing co-defendant Nicodemo Scarfo.

y) **United States v. Arnold**, 913 F. Supp. 348 (E.D.Pa. 1995), rev'd, 106 F.3d 37 (3d Cir. 1997). The Third Circuit reversed defendant's attempted murder conviction, upheld the witness intimidation conviction, and vacated the sentence. The court held that defendant's right to counsel attached when he was indicted for witness intimidation and any statements made thereafter regarding the murder of the witness without defendant's counsel present should have been suppressed at trial.

z) **In re: Gary Heidnik, White v. Martin Horn, et al.**, 960 F. Supp. 74 (E.D.Pa. 1997), rev'd, 112 F.3d 105 (3d Cir. 1997). The Third Circuit reversed the district court's decision denying White's motion to appear as next of friend in seeking a stay of execution on her father's behalf. The court found that petitioner had met her burden of demonstrating that Heidnik lacked capacity to proceed on his own behalf. The application for a stay of execution in this case was later denied by the United States Supreme Court. See White v. Horn, 527 U.S. 1050 (1999).

aa) **General Ins. Co. v. Eastern Consolidated Utilities, Inc.**, et al., 1997 U.S. Dist. LEXIS 17289 (E.D.Pa. 1997), rev'd, 126 F.3d 215 (3d Cir. 1997). The Third Circuit reversed the district court's decision to hold defendant in contempt for failing to appear at depositions and, as sanctions, take certain facts related to defendant and a non- party as established. The court determined that plaintiff had not set a time and place for the deposition and that non-parties could not be sanctioned in this manner.

bb) **United States v. Camacho**, No. 95-00394 (E.D. Pa. Filed May 21, 1996), rev'd, 149 F.3d 1166 (3d Cir. 1998). The Third Circuit vacated the district court's sentence which took into account uncorroborated evidence from the government that defendant had engaged in interstate travel while in possession of drugs. The decision took into account an opinion issued by the Third Circuit subsequent to the district court's sentencing.

cc) **Jess v. Wagner**, 1996 U.S. Dist. LEXIS 17769, aff'd in part, rev'd in part, 159 F.3d 1351 (3d Cir. 1998). The Third Circuit reversed in part the district court's grant of summary judgment in favor of defendants. The court held that a reasonable jury could have found that prison policy and training were deliberately indifferent to the risk of suicidal inmates. The court affirmed summary judgment of plaintiff's staffing and prison design claims.

dd) **A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.**, 2002 U.S. Dist. LEXIS 11286 (E.D.Pa. 2002), aff'd in part, rev'd in part, 237 F.3d 198 (3d Cir. 2000). The Third Circuit held that the district court had erred in fashioning a two step inquiry to determine a reverse confusion (of brands) claim. The court remanded for a different weighing of factors.

ee) **Holmes v. Pension Plan of Bethlehem Steel Corp.**, No. 1999 U.S. Dist. LEXIS 10467 (E.D.Pa. 1999), rev'd, 213 F.3d 124 (3d Cir. 2000). The Third Circuit reversed the district court's decision to apply the doctrine of laches and its determination that defendant's legal memorandum was protected from discovery under work-product immunity. The case was remanded for further findings of fact on both issues. Additionally, the Third Circuit affirmed the district court's decision to limit pre-judgment interest awarded to plaintiffs and deny certification of two classes of plaintiffs.

ff) **Moye v. Kyler**, 2000 U.S. Dist. LEXIS 18724 (E.D.Pa. 2000), rev'd, 225 F.3d 649 (3d Cir. 2000). The Third Circuit reversed and remanded Moye's habeas petition, which the district court had dismissed because petitioner was simultaneously pursuing state collateral relief. The court held that a petitioner need only exhaust direct appeals in a state system before pursuing federal relief.

gg) **Gruenke v. Seip**, 1998 U.S. Dist. LEXIS 16439 (E.D.Pa. 1998), rev'd., 225 F.3d 290 (3d Cir. 2000). The Third Circuit affirmed the district court's grant of summary judgment regarding plaintiff's "familial right to privacy" and free speech claims, but reversed as to plaintiff's Fourth Amendment and "privacy regarding personal matters" claims. The court held that a high school coach's urging a student to take a pregnancy test constituted an unreasonable search and that

genuine issues of material fact remained as to plaintiff's privacy claims.

hh) **Ferranti v. Jasin**, 2001 U.S. Dist. LEXIS 11466 (E.D.Pa. 2001), rev'd, 250 F.3d 735 (3d Cir. 2001). The Third Circuit reversed the district court's finding that no binding settlement agreement existed between the parties and that a formal agreement was intended only to memorialize, rather than finalize, the agreement. The case was remanded for further proceedings.

ii) **Estate of Smith v. Marasco**, 227 F. Supp. 2d 322 (E.D. Pa. 2002), aff'd in part, rev'd in part, 318 F.3d 497 (3d Cir. 2003). The Third Circuit reversed the district court's determination that no reasonable jury could find a violation of decedent's Fourteenth ("state-created danger" doctrine) and Fourth (use of excessive force and unreasonable search) Amendment rights. The Third Circuit affirmed summary judgment of plaintiff's claims regarding First Amendment retaliation, Fourteenth Amendment unreasonable seizure and malicious prosecution, and substantive due process cover-up and mishandling the corpse.

3. FEDERAL AND STATE CONSTITUTIONAL ISSUES:

a) **Rivera v. Reading Housing Authority**, 819 F.Supp 1323(E.D. Pa.), aff'd., Rodriguez v. Reading Housing Authority, 8 F.3d 961 (3d Cir. 1993). The Court held that a local housing authority's policy requiring that minor applicants obtain a judicial decree of emancipation to be eligible for public housing did not violate the U.S. Housing Act of 1937, the implementing regulations, or the Due Process Clause of the Fourteenth Amendment. Eligibility requirements that deny some needy applicants are consistent both with the Housing Act's policy of efficient management to ensure rental collection and with HUD regulations, which endorse minimum age requirements where, as the Court found here, the housing authority may not be able to enforce a contract with a minor. Moreover, in accordance with the Due Process Clause, the use of emancipation decrees to determine a minor's ability to enter into a contract constitutes a rational basis for establishing the age requirement.

b) **Walters v. City of Allentown**, 818 F.Supp 855 (E.D. Pa.), aff'd., 9 F.3d 1541 (3d. Cir 1993), cert. denied,

510 U.S. 1194, 114 S.Ct. 1301, 127 L.Ed.2d 653(1994). Mother of police officer's child born out of wedlock sought declaratory judgment that a pension plan for city employees, which granted benefits to the guardian of a deceased employee's dependent children only where there was no surviving spouse, violated the Equal Protection Clause of the Fourteenth Amendment. Noting that setting aside such a policy could undermine the foundation of countless similar such retirement plans across the country, the Court failed to find any purposeful discrimination in the facially neutral policy. Moreover, the plaintiff failed to identify any notion of a discriminatory intent or history underlying this policy, clearly designed to assist the spouses of fallen police officers.

c) **Satterfield v. Borough of Schuylkill Haven**, 12 F.Supp.2d 423 (E.D. Pa. 1998) (not appealed). Plaintiff brought this action against the Borough challenging his termination as Borough Manager under the due process clause, equal protection clause, First Amendment, and Uniformed Services Employment and Reemployment Rights Act (USERRA). The court held that triable issues existed as to whether plaintiff's termination was motivated by protected speech and/or his military status; the equal protection claim was preempted by the USERRA; statements in a campaign flyer regarding plaintiff's poor performance were privileged; and plaintiff could seek punitive damages regarding his USERRA claim.

d) **Gordon v. Lowell**, 95 F.Supp.2d 264 (E.D. Pa. 2000)(not appealed). Under 28 U.S.C. §§ 1983 and 1985, grandparents brought various constitutional claims against officials of county and state welfare agencies with respect to adoption proceedings. While recognizing that grandparents play an important role in the American family, the Court noted that state law does not enable them to have a property right in the child's custody and that the Due Process Clause protects only the rights of parents. Moreover, the grandparents had no standing to raise a claim under the state's Grandparents' Visitation Act, 23 Pa.C.S.A. § 5313, because the child never resided with them for at least one year, and notice of adoption was not warranted because they were never the guardians of the child. Finally, the grandparents' claims that the welfare officials failed to provide them complete

information and destroyed their relationship with the child does not rise to the level of conspiracy to commit civil rights violations.

e) **Zapach v. Dismuke**, 134 F.Supp.2d 682 (E.D. Pa. 2001) (not appealed). Plaintiff brought a 42 U.S.C. § 1983 claim against the chairperson of a township zoning hearing board, alleging a violation of his First Amendment rights, after the chairperson refused to let him use the names of political figures in his remarks opposing the appeal for a special exception to a zoning ordinance. Because all documents giving public notice of the hearing clearly restricted the purpose of the hearing to the appeal for the special exception, the Court found that the public hearing constituted a designated public forum. As such, despite the chairperson's claim that he stopped the speech for lack of relevance, the Court found that Plaintiff's remarks were censored based on his use of the township Supervisors' names, a content and viewpoint-based violation of his First Amendment rights. However, the chairperson was entitled to qualified immunity because a reasonable official presiding over a quasi-judicial body probably would not have known that ceasing speech based on the use of the names, the context of which was irrelevant to the hearing, violated the Constitution.

f) **Morrill v. Weaver**, 224 F.Supp.2d 882 (E.D. Pa. 2002) (not appealed). Plaintiffs brought an action challenging the constitutionality of a Pennsylvania statute governing nominating petitions. The statute required that affiants listed on a petition for candidates seeking nomination to be "qualified electors" of the district in which the candidate was running. The court held the provision was unconstitutional and void because it violates citizens' rights to free political expression and association under the First and Fourteenth Amendments.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1971-1979, served as appointed Solicitor of Palmer Township, Northampton County, Pennsylvania.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I did not practice alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1968-1970. Corporate Law Department, Hazeltine Corporation, Greenlawn, L.I., New York 11740. Served as contracts lawyer.

1970-1971. Chief Counsel, Northampton County Legal Aid Society, now known as North Penn Legal Services, Inc. 65 East Elizabeth Avenue, Suite 903, Bethlehem, PA 18018. Served as full-time legal aid lawyer.

1971-1979. Hemstreet, Smith and Van Antwerpen, 7th and Washington Streets, Easton, PA 18042. Served as an associate from 1971-1973 and as a partner from 1973-1979 in the general practice of law with a sub-specialty in municipal law. The firm no longer exists.

1979-1987. Judge of the Court of Common Pleas of Northampton County, County Courthouse, 7th and Washington Streets, Easton, PA, 18042.

1987-Present. United States District Judge for the Eastern District of Pennsylvania, Philadelphia, PA. Sworn in on December

21, 1987.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

1968-1970. Practice at Hazeltine involved the writing and review of government and other types of contracts. (Not admitted in New York).

1970-1971. Practice as Chief Counsel of Legal Aid Society involved all types of civil litigation, including bankruptcy, defense of civil suits and family law matters.

1971-1979. General practice of law involved prosecution of minor criminal charges as a municipal attorney, limited criminal law practice and a general civil practice, including plaintiffs and defendants litigation, family law and municipal law.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Former Clients: Palmer Township, 1971-1979; Northampton County Council of Governments, 1975-1979; Northampton County Association of Tax Collectors, 1977-1979; Cement Belt Municipalities Association, 1975-1979; Palmer Township Business Industrial & Professional Association, 1976-1979. General counsel for the Fairview Savings and Loan Association, now Citizens Savings Association, 1971-1979; and local counsel for the Blue Mountain Consolidated Water Company, 1976-1979.
Area of Specialization: Municipal law.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Appeared in court regularly from 1970 to 1979.

2. What percentage of these appearances was in:
(a) federal courts; 10%
(b) state courts of record; 60%

©) other courts. 30%

3. What percentage of your litigation was:
(a) civil; 70%
(b) criminal. 30%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

   Sole counsel; 30.
   Associate counsel; 10.

5. What percentage of these trials was:
   (a) jury; 20%
   (b) non-jury. 80%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   ©) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1) **Lafayette Trust Bank v. Department of Banking**, 13 Pa. Commw. 111, 318 A.2d 396 (1974), appeal to Supreme Court denied July 18, 1974. Represented First Valley Bank in extensive administrative hearings and appeals which established need and right of client, First Valley Bank, to locate branch office in Easton, PA, and limited application of res judicata doctrine in administrative agencies.

   a) Matter was tried on numerous dates through the year 1973.

   b) Matter was tried before Examiners of the Pennsylvania Department of Banking, Harrisburg, PA, and affirmed on appeal by Judge Wilkinson of the Commonwealth Court of Pennsylvania.

   c) The late George Coffin, Esquire, of Easton, PA, for Lafayette Trust Bank. Edward L. Symons, Jr., who is now with the University of Pittsburgh

School of Law, 3900 Forbes Avenue, Pittsburgh, PA 19260, telephone 412-648-1386, for the Department of Banking. Roland Morris, Esquire, of Duane Morris & Heckscher, One Franklin Plaza, Philadelphia, PA 19102, telephone 215-854-6300, co-counsel for the First Valley Bank.

2) **Palmer Mun. Sewer Auth. V. Witty**, 26 Pa. Commw. 117, 362 A.2d 1106 (1976), rev'd, 479 Pa. 240, 388 A.2d 306 (1978). Represented Palmer Township in jury trial concerning validity of municipal liens. After final argument, court directed verdict, Commonwealth Court reversed holding double abutment lots benefitted, Commonwealth Court reversed in 1978 by Supreme Court of Pennsylvania, 479 Pa. 240, 388 A.3d 306.

   a) Matter was tried for one week in 1975.

   b) Matter was tried in the Court of Common Pleas of Northampton County, Easton, PA before Judge Michael V. Franciosa, who is now retired.

   c) Herbert Toff, Esquire, of Easton, PA for defendants Jack K. Witty and his wife (Mr. Toff is now retired and living in Florida). David A. Franklin, Esquire, of Pepper Hamilton & Scheetz, 123 S. Broad Street, Philadelphia, PA 19109, telephone 215-893-4521, co-counsel for appellants.

3) **Commonwealth v. Township of Palmer**, 16 Pa. Commw. 270, 329 A.2d 871 (1974). Represented Palmer Township in eminent domain proceeding in which the Appellate Court held municipalities are not entitled to damages for flooding type of taking under the Eminent Domain Code of United States or Pennsylvania Constitutions.

   a) Matter was tried non-jury for one day in lower court in 1973 on stipulated facts.

   b) Matter was tried in the Court of Common Pleas of Northampton County, Easton, PA before Judge Richard D. Grifo, who is now retired.

   c) Opposing counsel was Lawrence R. Wieder, Assistant Attorney General, Legal Bureau, Department of Transportation, Harrisburg, PA (present address unknown).

4) **Forks Township Mun. Sewer Auth. v. American Land, Inc.**, 6 Pa. Commw. 569, 297 A.2d 185 (1972). Represented Forks Township Municipal Sewer Authority in case establishing right of municipalities through state to collect any lien costs and fees in municipal claims.

   a) Matter was argued in lower court in 1971.

   b) Matter was tried in the Court of Common Pleas of Northampton County, Easton, PA before late President Judge Alfred T. Williams, Jr.

   c) Opposing counsel was Thomas P. Stitt, Esquire, P. O. Box 483, Easton, PA, telephone 610-253-9111. Robert J. Woodside was co-counsel. The last I heard Mr. Woodside was Judge of the Bankruptcy Court, Federal Building, P. O. Box 908, Harrisburg, PA 17108, telephone 717-782-2260.

5) **Palmer Township Fire Co. v. Township of Palmer**, 41 North. Cty. Reptr. 231 (1973), cited with approval in Lacey Park Volunteer Fire Co. No. 1 v. Board of Supervisors, 27 Pa. Commw. 54, 365 A.2d 880. Represented Palmer Township in case which established right of municipal officials to control and regulate fire fighting. No appeal was taken.

   a) Matter was tried non-jury for two days in 1973.

   b) Matter was tried in the Court of Common Pleas of Northampton County, Easton, PA before the late President Judge Clinton Budd Palmer.

   c) Opposing counsel was Elwood M. Malos, Esquire, Easton, PA. (Mr. Malos is now retired and living in Florida).

6) **Kardelis v. Cangelosi**, 54 Pa. D. & C.2d 622 (1971). Represented plaintiffs Kardelis, et al. in equity case which further expanded and applied Restatement of Contracts, § 90, Promissory Estoppel and Equity Jurisdiction. No appeal was taken.

   a) Matter was tried for two days in 1971.

   b) Matter was tried in the Court of Common Pleas of Northampton County, Easton, PA before Judge Michael V. Franciosa, who is now retired.

c) Opposing counsel was Frank Poswistilo, Esquire, 101 Larry Holmes Drive, Suite 300, Easton, PA 18042, telephone 610-252-4338.

7) **Adams v. Hunter**, 41 North. Cty. Reptr. 185 (1973). Represented plaintiffs Adams in equity case involving partition and adverse possession, case of first impression, actual notice rather than constructive notice rule adopted following rule in Alabama, Mississippi and Kansas. No appeal was taken.

a) Matter was tried non-jury for two days in 1973.

b) Matter was tried in the Court of Common Pleas of Northampton County, Easton, PA before the late President Judge Clinton Budd Palmer.

c) Opposing counsel was Lawrence J. Briody, Esquire, Briody & Briody, 429 East Broad Street, P. O. Box 1246, Bethlehem, PA 18016-1246, telephone 610-865-6466.

8) **Stephen Allen Passarelli v. Commonwealth of Pennsylvania**, (1978) No. 3925 Allocatur Docket. Represented criminal defendant and successfully obtained suppression of all evidence. Reversed on appeal. (Decision not reported).

a) Matter was tried and argued for two days in 1978.

b) Matter was tried in the Court of Common Pleas of Northampton County, Easton, PA before late President Judge Alfred T. Williams, Jr.

c) Co-counsel was Gus Milides, Esquire, 654 Wolf Avenue, Easton, PA 18042, telephone 610-258-0433.

9) **Green v. Green**, 228 Pa.Super. 905, 322 A.2d 689 (1974). Matter was tried at trial stage and on appeal to the Superior Court of Pennsylvania which affirmed per curiam the denial of a divorce when the plaintiff was not innocent and injured. Further expanded grounds for denial of a divorce.

a) Matter was tried for three days in 1973.

b) Matter was tried in the Court of Common Pleas of Northampton County, Easton, PA before the late President Judge Clinton Bud Palmer.

c) Opposing counsel was Richard J. Shiroff, Esquire, 724 Lehigh Street, Easton, PA 18042, telephone 610-253-1023, and Gus Milides, Esquire, 654 Wolf Avenue, Easton, PA, telephone 610-258-0433.

10) In lieu of another litigated matter, I list the following legislation which was authored by me and enacted:

Act of 1974, Dec. 30, Pub. L. 1035, No. 337, Pa. Stat. Ann. Tit. 35, § 6001 (amended Pennsylvania Solid Waste Act at length). (Repealed 1980).

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

As a Common Pleas Judge I helped re-write Pennsylvania's new Domestic Relations Law so that it would conform to federal requirements. See 23 Pa. Cons. Stat. Ann. §§ 4301-4354. As a municipal solicitor, I oversaw the massive legal problems inherent in acquiring title to seven miles of railroad and converting it into a recreational bikeway. I also re-wrote a major portion of the municipal ordinances of Palmer Township. As a lawyer I settled numerous cases prior to trial and I believe this ability to settle matters has assisted me as a judge. In 1983 I was asked by Pennsylvania supreme Court Chief Justice Roberts to become Acting President Judge of Bradford County to straighten out a backlog which had developed. I completed this assignment successfully. As a federal judge, I have served on the Defenders Services Committee of the Judicial Conference of the United States, and I was Chairman of the Subcommittee on Federal Defender Funding from 2000-2001.

Senator SPECTER. What has been your most challenging case while serving on the Federal district court?

Judge VAN ANTWERPEN. I think I would have to say that the most challenging case took place shortly after I went on the bench, Senator. I was the judge that tried the entire Philadelphia Mafia, all 18 of them at once, in a four- or five-month trial. It was an extended proceeding. It was ultimately affirmed on appeal. That took a great toll in terms of the effort, the time involved, the judicial rulings that had to be made, the research that went into it.

Senator SPECTER. Do you think it is tougher to be a prosecutor who investigates and prosecutes organized crime than to be a judge who sits on the bench and tries the defendants?

Judge VAN ANTWERPEN. I think they are all tough jobs, Senator. I couldn't really speak for one or the other, but—

Senator SPECTER. You haven't been a prosecutor.

Judge VAN ANTWERPEN. Not really. I prosecuted—when I was in private practice, I prosecuted on behalf of the municipalities I represented, but those were only summary offenses.

Senator SPECTER. You never prosecuted organized crime?

Judge VAN ANTWERPEN. No, sir, but I—

Senator SPECTER. Well, I have never judged organized crime, so we are even, Judge Van Antwerpen.

Judge VAN ANTWERPEN. Thank you, sir. You certainly have a distinguished record in prosecuting, sir.

Senator SPECTER. Your ability to constructively interact with your fellow judges on the Third Circuit will be an important element of your work. How will that be different from your work as a district judge, where you made the decision yourself? What role do you think collegiality plays in the Federal bench, contrasting the circuit to the district court?

Judge VAN ANTWERPEN. Collegiality, I believe, does play a very important role. Quite obviously, a district judge can act on his or her own. A circuit judge cannot really do anything without getting at least one other circuit judge to go along with you.

Senator SPECTER. Do you think that is harder or easier than getting 50 other Senators to do along?

Judge VAN ANTWERPEN. Senator, again, I wouldn't presume to comment on the difficulties of your job, but you work very hard, I am certain.

Senator SPECTER. You served as chief counsel for what is now known as North Penn Legal Services. In our society, Judge, how important do you think it is that legal services be available for those who cannot afford it?

Judge VAN ANTWERPEN. I think it is extremely important, Senator. That is why I left a higher-paying job in New York City to go to Northampton County and become the chief counsel of the Legal Aid Society. That is why, even after I went into private practice, I continued to do volunteer work for them.

Senator SPECTER. Without objection, the full statement of Senator Leahy will appear in the record, and I think the last paragraph is worth reading. Senator Leahy says, "I look forward to the testimony of Judge Franklin Van Antwerpen, who has been nominated for the Third Circuit. I know of Senator Specter's strong support for this nomination. In contrast to many of President Bush's

nominees, Judge Van Antwerpen comes to us with a distinguished career on the bench both on the State and Federal levels. I welcome him to the Committee," close quote.

That is a good statement to have from the ranking Democrat, Judge Van Antwerpen.

Judge VAN ANTWERPEN. Yes, sir.

Senator SPECTER. I am going to ask you all the standard questions that the Committee asks because it isn't really unusual for someone presiding at a confirmation hearing, as I am today, to be the sponsor of the nominee.

At first blush, it might appear that there would be a conflict of interest or pre-judgment, but that is the way our system works. But to touch all the bases, I am asking all the questions which the staff has prepared. All the questions I have asked are staff-prepared and I am going to ask you the balance of them, as is the regular practice of the Committee.

Under what circumstances do you believe it appropriate for a Federal court to declare a statute enacted by Congress unconstitutional?

Judge VAN ANTWERPEN. Well, we know that a statute enacted by Congress has a presumption of validity. Obviously, if it is shown to be unconstitutional and improper, then it would be appropriate to do so, but the burden is on the person asserting its unconstitutionality. It is not something that happens very often, quite frankly.

Senator SPECTER. Have you ever declared an act of Congress unconstitutional?

Judge VAN ANTWERPEN. I have not, sir.

Senator SPECTER. The Supreme Court precedents are obviously binding on all the Federal courts. Are you committed to following the precedents of higher courts faithfully and giving them full force and effect even if you personally disagree with such precedents?

Judge VAN ANTWERPEN. That is my obligation, Senator.

Senator SPECTER. What would you do if you believed the Supreme Court had seriously erred in rendering a decision? Would you nevertheless apply that decision or your own best judgment on the merits?

Judge VAN ANTWERPEN. Mr. Chairman, I would follow that precedent. That is my obligation.

Senator SPECTER. These questions aren't too hard to answer, are they, Judge Van Antwerpen?

If there was no controlling precedent dispositively concluding an issue with which you were presented in your circuit, what sources would you turn to to make your decision?

Judge VAN ANTWERPEN. Well, of course, you still look at precedent. You may not have something exactly on point, but you look at the closest thing that you can find and you look at what other courts have said with regard to that issue. If you are dealing with an enactment by the Congress, there are many things that you could look at in interpreting that Congressional enactment. You could look at the records of the floor debate. You would look at all the usual sources.

Senator SPECTER. Under what circumstances, if any, do you believe an appellate court judge should overturn precedent within his or her own circuit?

Judge VAN ANTWERPEN. Well, in the Third Circuit there is an internal working procedure whereby one panel does not overturn the legal holding of another panel. Now, there can be circumstances under which a different result would be reached.

For instance, if the precedent or legislation which had prompted the first panel to rule changes—if there is a change in the law, that can happen. In addition, you are often faced with a similar but nevertheless different factual situation. But other than that, the panels in the Third Circuit generally follow this internal procedure.

Senator SPECTER. The Supreme Court of the United States—this is my question—has cut back considerably on Congressional authority. Since Lopez was overturned under the Commerce Clause, the Supreme Court has adopted a doctrine of declaring acts of Congress unconstitutional if they haven't been, quote, "thought through," unquote.

I will not press you for an answer, but if you care to offer an opinion as to the propriety of the Supreme Court saying Congress hasn't thought it through. Who is the Supreme Court to think it through, saying the Congress hasn't thought it through?

Judge VAN ANTWERPEN. That is a difficult question to answer, Senator. As a district court judge, I don't really feel it proper for me to comment on the actions of the Supreme Court.

Senator SPECTER. You wouldn't want to criticize the Supreme Court?

Judge VAN ANTWERPEN. I am a district judge, sir.

Senator SPECTER. And you probably wouldn't want to criticize Congress.

Judge VAN ANTWERPEN. No, sir.

Senator SPECTER. So don't answer the question.

[Laughter.]

Judge VAN ANTWERPEN. Yes, sir.

Senator SPECTER. If, as and when I become Chairman of this Committee, I am going to go into that issue in some considerable depth because I challenge the Court on that determination of unconstitutionality.

If the Court says that a given clause of the Constitution is violated by the Congress, as a district court in California did yesterday on the PATRIOT Act, that is a judicial function—vagueness, unconstitutionality. But on this "thought through" doctrine, I have grave reservations.

Back to the books, Judge Van Antwerpen.

Judge VAN ANTWERPEN. Yes, sir.

Senator SPECTER. You have stated that you will be bound by Supreme Court and, where applicable, the rulings of the Federal court. There may be times when you will be faced with cases of first impression. Well, I think you have already answered that.

With respect to case management, if confirmed, how do you intend to manage your caseload?

Judge VAN ANTWERPEN. Well, it is a somewhat different system on the circuit court. As you know, a district judge has to engage in case management as a big part of his or her job—scheduling,

moving cases, keeping track of them, making sure they don't fall through the cracks.

On the circuit court, a lot more of that is done for you by the clerk of the court, as you well know, Senator. And I think that, nevertheless, you have to maintain internal controls in your office to see to it that you get your opinions done and out on a timely basis. I think my experience as a district judge has taught me how to do that.

Senator SPECTER. With respect to judicial temperament, when I was on this Committee for a very short time, there were two Pennsylvania judges up for Federal appointment. This was 1982 and Senator Thurmond was presiding, sitting in this chair.

He said to the two judges, two judicial nominees, if you confirmed, do you promise to be courteous, which, translated from South Carolina, is, if confirmed, do you promise to be courteous. And when I heard him ask that question, I thought it wasn't exactly a penetrating question; what was the nominee going to say but yes? And both said yes.

Then Senator Thurmond said, the more power a person has, the more courteous the person should be; translated, the more power a person has, the more courteous the person should be. And I have come to regard that as a very profound statement, perhaps the most profound statement which has been uttered from a Senator during my tenure here, not that there is very heavy competition for being profound.

I always ask that question, knowing what the answer will be, as I haven't been surprised by any of your other answers, Judge Van Antwerpen. Judges have commented to me with some frequency over the years that they remember that question.

I have a lot of confidence in your judicial temperament. I have seen you in action. But there is a quality—when a person puts on that black robe, all the power that that person has, and life tenure, there is a tendency to become impatient with lawyers or litigants, witnesses. Very frequently, there is good cause to be impatient and to be disgruntled. It is a very high calling to maintain that level of courtesy.

So how would you answer Senator Thurmond's question?

Judge VAN ANTWERPEN. Senator, I agree with you completely, Mr. Chairman. It is a very important attribute, judicial temperament. Judicial temperament is difficult to define, but you know it when you see it, and one of the key factors in that is being courteous and polite and respectful, listening to lawyers, listening to witnesses, hearing them out.

There are times that as a district judge things can be harried, as you noted, but I have always done my very best to be polite to people and to be respectful.

Senator SPECTER. Well, I have great confidence in you on that score, as all the other attributes, Judge Van Antwerpen.

I have made inquiries and I believe that your appointment to the Court of Appeals for the Third Circuit will be the first from the Lehigh Valley. Senator Santorum and I try to have geographical distribution. You take the seat of a very, very distinguished Federal judge, Edward R. Becker, who got the Devitt Award last year as

the outstanding Federal judge, a man I have known for many years.

We rode the elevated PTC, Philadelphia Transportation System, together to Penn many years ago. I will not cite the year because I would not want to disclose Judge Becker's age. Before that, Judge Max Rosen held the seat. We came back to a different area when Judge Hutchinson was on the Third Circuit.

We rotate the district court judgeships and have a bipartisan panel which makes recommendations, and then we turn to the counties to give us their recommendations. We do not make the selection in most cases, but turn to the counties to tell us whom they would like to have, as we did in Lancaster County for Judge Stengel, and to other counties, and recently to Somerset County.

But I believe you will be the first circuit judge from the Lehigh Valley. You have had very distinguished Federal judges—Judge Kahn, who was chief judge.

Judge VAN ANTWERPEN. Yes.

Senator SPECTER. Judge Gainey. Did you know Judge Gainey?

Judge VAN ANTWERPEN. I came to the bar just as we he was closing out his career. He died around 1969 or 1970.

Senator SPECTER. Judge Gainey was from Easton and was a very impressive judge, handed down some very major decisions on the antitrust electrical cases going back into the 1950's. As I recollect it, he sent a lot of big-wheel executives to jail for antitrust violations, something we ought to do with the people who violate the antitrust laws on OPEC—another subject which I hope to get into in some detail if, as and when I become Chairman of this Committee.

Well, Judge Van Antwerpen, the paucity of Senators in attendance here is a tribute to their confidence in you. Had they had doubts, they would have been here to express them. We have expedited your hearing, and I thank Senator Hatch for that because it is going to be harder to confirm Federal judges as we get closer to November, in an election year, and especially harder to confirm circuit judges.

But we got Judge Fisher through in record time, and we got Judge Brooks through, who was the only contested circuit judge in 2002. And I am optimistic that we will be in your home district on an induction ceremony in the fairly near future.

Judge would you introduce those who are with you?

Judge VAN ANTWERPEN. Senator, thank you. I have brought with me, first of all, my deputy clerk—they have all taken the day off from work and they will put in for this time appropriately so the Government won't be paying.

Anthony Tumminello is my deputy clerk. Next to him is Amanda Kastello, one of my law clerks. Next to her is Tara LaMorte, one of my law clerks. And the third law clerk is Renee Sewchand, who is seated there.

Senator SPECTER. Does a man of your background and erudition need three law clerks?

Judge VAN ANTWERPEN. Well, Senator, it certainly helps with the workload.

Senator SPECTER. Congratulations.

That concludes the hearing.

[Whereupon, at 10:32 a.m., the Committee was adjourned.]
[Questions and answers and submissions for the record follow.]

CHAMBERS OF
S. VAN ANTWERPEN
JUDGE

United States District Court
EASTERN DISTRICT OF PENNSYLVANIA

101 LARRY HOLMES DRIVE
EASTON, PA 18042
(610) 252-6522

February 18, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch,

I enclose herewith my responses to the follow-up questions from Senator Durbin. I will be happy to answer any further questions you may have.

Very truly yours,

Franklin S. Van Antwerpen

Enclosure

cc: The Honorable Patrick J. Leahy

In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer: I did not meet with any staff of the Senate Judiciary Committee.

In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer: I met for about one hour with staff of the U.S. Department of Justice on the day prior to my Senate hearing. No one at that meeting shared, referenced, or provided any information which lead me to believe such information had come from Democratic sources. No one at that meeting provided me with any documents or excerpts from documents that appeared to have been drafted by Democratic staff.

In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of The White House? If so, during those meetings, did any staff of The White House share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of The White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer: One person from the staff of The White House was also present at the meeting on the day prior to my Senate hearing as

described in my answer to Question 2. No one at that meeting shared, referenced, or provided any information which lead me to believe such information had come from Democratic sources. No one at that meeting provided me with any documents or excerpts from documents that appeared to have been drafted by Democratic staff.

In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any of these individuals, groups, or organizations provide you any documents or excepts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer: I did not meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees.

SUBMISSIONS FOR THE RECORD

News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

January 28, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the Nomination of

FRANKLIN S. VAN ANTWERPEN TO BE UNITED STATES CIRCUIT JUDGE FOR THE THIRD CIRCUIT

This morning we welcome to the Committee Franklin Van Antwerpen, whom President Bush has nominated for a seat on the Third Circuit Court of Appeals.

This is Judge Van Antwerpen's second bite at the Third Circuit apple. He was initially nominated to this court in September 1991 by the first President Bush. I am pleased that we have the opportunity to once again consider his nomination.

Judge Van Antwerpen has exceptional qualifications for the federal appellate bench. After graduation from Temple University School of Law in 1967, he worked as an attorney at the Hazeltine Corporation and served as Chief Counsel of the Northampton Legal Aid Society. He then spent nine years in private practice, representing both plaintiffs and defendants in general litigation matters, with a particular specialization in municipal law.

In 1979, Judge Van Antwerpen commenced a twenty-five year career in public service when he joined the Court of Common Pleas of Northampton County. He served in this position until 1987, when President Reagan appointed him United States District Judge for the Eastern District of Pennsylvania, the position he holds today.

Judge Van Antwerpen's impressive credentials are reflected in his unanimous American Bar Association rating of Well Qualified. We are honored to have him before us today, and look forward to hearing from him.

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OPENING STATEMENT OF SENATOR PATRICK LEAHY
HEARING BEFORE THE SENATE JUDICIARY COMMITTEE
JANUARY 28, 2004

This hearing is another demonstration of how untrue the rhetoric is that is so often bandied about by Republican partisans that Democrats are obstructing the confirmations of this President's judicial nominees. The reality is that we have cooperated to an extraordinary extent, especially when contrasted with Republican treatment of President Clinton's judicial nominees.

Today marks the Judiciary Committee's second hearing in the last two weeks for circuit court nominees. Traditionally, the number of nominees who have received hearings and who are considered in a presidential election year has been lower than in other years. In 1996, only four circuit court nominees by President Clinton received a hearing from the Republican Senate majority. In 2000, only five circuit court nominees by President Clinton received a hearing from the Republican Senate majority. Of course, two of those outstanding and well-qualified nominees in 2000 were never allowed to be considered by the Committee or the Senate. By contrast, here we are, before the end of the first month of 2004, and we have already held hearings for two circuit court nominees. By the standard Republicans set in 1996 and 2000, we would be half done for the entire year.

Second, an area in which Democrats and Republicans have taken very different approaches is the issue of recess appointments. Despite the Committee's rejection of the Pickering nomination in 2002 and the Senate's unwillingness to give its consent to the nomination in 2003, President Bush has nonetheless appointed Charles Pickering to the Fifth Circuit. His renomination of Judge Pickering after rejection of that nomination by the Judiciary Committee and his recess appointment are both unprecedented. The President made his appointment on Friday January 16, 2004, during the congressional recess and the weekend set aside to honor the memory and work of Dr. Martin Luther King, Jr.

This temporary appointment can be distinguished from President Clinton's recess appointment of Judge Roger Gregory to the Fourth Circuit in December 2000 in many ways: Roger Gregory had been denied a Judiciary Committee hearing even though he had the bipartisan support of both of his home-state Senators – Democratic Senator Chuck Robb and Republican Senator John Warner. By contrast, Judge Pickering participated in hearings and an extensive record was developed on which his nomination was opposed in the Judiciary Committee and in the Senate on the merits on the basis of his record as a district court judge. Roger Gregory's nomination was never allowed to be considered by the Judiciary Committee. By contrast, Judge Pickering's nomination was fully and fairly debated in 2002 and rejected by the Judiciary Committee. Indeed, Judge Pickering's renomination was the first time a President had resent a judicial nomination to the Senate after the Judiciary Committee had voted on and rejected that judicial nomination. Likewise, Judge Pickering's temporary appointment is the first after rejection by the Judiciary Committee and after the Senate has debated a judicial nomination and withheld its consent.

Moreover, Roger Gregory's recess appointment fit squarely in the tradition of Presidents' exercising such authority in order to expand civil rights and to bring diversity to the courts. Four of the five first African American appellate judges were recess-appointed to their first Article III position, including Judge William Hastie in 1949, Judge Thurgood Marshall in 1961, Judge Spottswood Robinson in 1961, and Judge Leon Higginbottom in 1964. Unlike these nominees and the public purposes served, Judge Pickering was opposed by civil rights groups, including all chapters of the Mississippi NAACP, the Southern Christian Leadership Conference, and by the Magnolia Bar Association. Rather than bring people together and move the country forward, this President's recess appointment is another source of division.

In addition to the differences in how the power of recess appointments has been exercised, the Senate reaction to such appointments has also differed dramatically. When President Clinton used his recess appointment power to appoint James Hormel ambassador to Luxembourg, Senator Inhofe responded by saying that President Clinton had "shown contempt for Congress and the Constitution" and declared that he would place "holds on every single Presidential nomination." Republicans continued to block nominations until President Clinton agreed to make recess appointments only after Congress was notified in advance. On November 10, 1999, 17 Republican Senators sent a letter to President Clinton telling him that if he violated the agreement, they would "put holds for the remaining of the term of your Presidency on all of the judicial nominees."

In November 1999, President Clinton sent a list of 13 positions to the Senate that he planned to fill through recess appointments. In response, Senator Inhofe spoke out on the Senate floor denouncing five of the 13 civilian nominees with a threat that if they went forward, he would personally place a hold on every one of President Clinton's judicial nominees for the remainder of the administration. That led to more delays and to the need for a floor vote on a motion to proceed to consider the next judicial nomination, in order to override the Republican objections.

When President Clinton appointed Judge Gregory, Senator Inhofe called it "outrageously inappropriate for any president to fill a federal judgeship through a recess appointment in a deliberate way to bypass the Senate." Judge Gregory was eventually confirmed after his renomination in 2001 with near unanimity. There was only one negative vote. Senator Lott cast that vote and his spokesman said his opposition was done to underscore his stance that "any appointment of federal judges during a recess should be opposed." Ironically, Senator Lott is now one of Judge Pickering's strongest supporters.

As far as I know, no Senate Democrats were consulted by this President before he made his divisive appointment of Judge Pickering. It was only after President Bush appointed Charles Pickering to the bench that I learned about the appointment. Despite that, Senate Democrats are today participating in making sure the process of judicial appointments moves forward. Democrats have not obstructed the confirmation process for judicial and executive branch nominations as Republicans did when President Clinton made recess appointments. In fact, already this week, less than two weeks after President Bush

appointed Judge Pickering and a number of other executive branch officials, we have joined in confirming 18 presidential nominees by unanimous consent.

This morning we continue our work with the senior Senator from Pennsylvania to fill judicial vacancies in Pennsylvania. I look forward to the testimony of Judge Franklin Van Antwerpen, who has been nominated for the Third Circuit. I know of Senator Specter's strong support for this nomination. In contrast to many of President Bush's nominees, Judge Van Antwerpen comes to us with a distinguished career on the bench – both on the State and federal levels. I welcome him to the Committee.

NOMINATIONS OF WILLIAM GERRY MYERS III, OF VIRGINIA, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT; WILLIAM S. DUFFEY, JR., OF GEORGIA, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA; AND LAWRENCE F. STENGEL, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THURSDAY, FEBRUARY 5, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in Room 2141, Rayburn House Office Building, Hon. Larry E. Craig presiding.

Present: Senators Craig, Hatch, Chambliss, Specter, Leahy, Kennedy, Durbin, Feingold, Schumer, and Feinstein.

OPENING STATEMENT OF HON. LARRY CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. We would ask everyone to please take their seats.

Well, let me thank you all for finding your way to the House Judiciary Committee room this morning and a very special thanks to the House Judiciary staff and Chairman Sensenbrenner for allowing us to hold these judicial nomination hearings here in the House chamber. I understand we are making a bit of history this morning. To the staff's knowledge, this is the first time that judicial nominees that are the responsibility of the United States Senate have been heard in the House chambers. So we are always pleased to make a little history, and we might be doing that this morning.

This morning, we will hear testimony from three nominees; one for the Ninth Circuit Court, William Myers III. He will be the first panel.

The second panel will be made up of two District judges: William Duffey for the Northern District of Georgia and William Stengel for the Eastern District of Pennsylvania.

Because so many of our colleagues have joined us this morning, let us get opening statements on behalf of these nominees from all of our colleagues, and then we will ask the nominees to come for-

ward, I will administer to them their oath, and we will proceed in that manner.

With that, let me turn, first, to the Ranking Member of the Committee, Senator Pat Leahy of Vermont.

Senator.

Senator LEAHY. Thank you, Mr. Chairman. Thank you for your usual courtesy of holding up while I tried to find my way around here. Those of our colleagues who have served in the other body know their way around here better. I did not have that privilege of serving in the House, and I still get lost.

But I noticed we have several members here who have an interest, of course, the two Senators from Pennsylvania, the two Senators from Georgia, and I understand we are going to be joined by the other Senator from Idaho. I will withhold my opening statement, Mr. Chairman, so as not to hold them up.

Senator CRAIG. Well, then, with that, let me turn to certainly a distinguished member of this Committee, the senior Senator from the State of Pennsylvania, Arlen Specter.

Senator.

PRESENTATION OF LAWRENCE F. STENGEL, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chair, and good morning, ladies and gentlemen.

It is unique to have the Judiciary Committee of the Senate on the House side, and I, for one, feel honored to be able to sit on this dais. I have been in this room on a number of occasions, but always as a witness. So it is nice to be a member over here on the House side.

I have the honor and pleasure of presenting to this Committee Hon. Lawrence F. Stengel, of Lancaster, for confirmation for the United States District Court for the Eastern District of Pennsylvania. Judge Stengel now serves as a Common Pleas judge in Lancaster and has served with great distinction for more than 13 years. He is a graduate of St. Joseph's University, Philadelphia, the University of Pittsburgh Law School. So he represents all factions, all geographical areas of Pennsylvania.

Those were not the qualities which Senator Santorum and I looked for when we made our recommendation to the President that he be appointed to the bench. What we were looking for was an outstanding academic record and professional record. He practiced law in Pittsburgh for 5 years and came back to his native Lancaster for 5 years until he was appointed to the Common Pleas bench.

Senator Santorum and I have established a bipartisan—really, a nonpartisan—Judicial Selection Panel to screen candidates, and we rotate among the counties to give representation, and once qualifications are established, and they are outstanding with Judge Stengel, it is up to the county to make the selection. We look to the county to tell us whom they want for judge, and no litmus test, no ideology, just the outstanding candidate and then a local selection.

We have established a station in Lancaster, which is not had a judge recently, but I am pleased to confirm that Judge Stengel has committed to sit in Lancaster. Senator Santorum and I are interested in giving the litigants and the lawyers the opportunity not to have to travel long distances to Philadelphia or Pittsburgh or Wilkes-Barre or Scranton, so that it is an added plus that Judge Stengel will be there to facilitate the business of the court.

So I am delighted to be here this morning, Mr. Chairman, and might I yield, at this point, to my distinguished colleague, Senator Santorum?

Senator CRAIG. Thank you very much.

Let me turn to Senator Rick Santorum of the State of Pennsylvania, please.

PRESENTATION OF LAWRENCE F. STENGEL, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Mr. Chairman.

I was just whispering to Senator Crapo that one of the great advantages of coming from Pennsylvania is having the senior member of the Judiciary, which means you always go first, and so I appreciate Senator Specter for many things, but one is the ability to go first at these panels, where you usually have very long lines here. I appreciate your seniority.

Let me also say I appreciate the fact that Senator Specter has carried on now, for the many years he has been in the United States Senate this concept of a nonpartisan Judicial Selection Committee. And when we went through this process for openings in the Eastern District, Senator Specter and I made it known that one of the areas that we wanted to get nominees from was from Lancaster County because Lancaster County, which is a large county in the Eastern District, has a place for a Federal judge to sit, but has not had a Federal judge recently. And several names came forward from the panel but, without question, the legal community in Lancaster came forward to us and clearly stated their preference, on a bipartisan basis, for a sitting Common Pleas judge in Lancaster, and that was Judge Stengel.

We have rarely seen situations where the community has come forward in such strong terms to recommend someone among their ranks, and I think that just goes to show that the quality of this man not just on the bench, but his community service, his outstanding work as a husband and father, and this is someone who I am very pleased to be here to introduce to this body.

Senator Specter has reviewed his record. I will not repeat it, but it is the qualities that have made this man a good to date that I assure the members of the Judiciary he will be an excellent judge on the Eastern District.

Senator CRAIG. Thank you both very much.

I see we have been joined by Senator Kennedy and Senator Durbin.

Senator Durbin, we are proceeding with open statements by the Senators who are here to endorse their candidates. Do you wish to make any statement prior?

Senator DURBIN. I will waive an opening statement.

Thank you very much.

Senator CRAIG. Now, let me turn to those who are here to speak on behalf of William Duffey for the Northern District of Georgia, Saxby Chambliss, a member of this Committee.

Saxby? Senator Chambliss?

PRESENTATION OF WILLIAM S. DUFFEY, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA, BY HON. SAXBY CHAMBLISS, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator CHAMBLISS. Thank you very much, Mr. Chairman.

Senator Leahy, you mentioned those of us who served in the House have an easier way maybe of finding our way over here. I am reminded again this morning by some of my House colleagues or former House colleagues that I have to come over here to get a dose of reality every now and then. So they never forget to remind me of that.

I am very pleased to be with my colleague, Senator Zell Miller, here this morning to recommend to this panel the confirmation of Bill Duffey, who is currently the U.S. attorney for the Northern District of Georgia, for a judgeship position on the bench of the Northern District of Georgia.

Bill Duffey has been a long-time good friend of mine but, more importantly, I have known Bill Duffey as just one of the more outstanding lawyers in our great State, and I am very pleased to say that we are blessed with a number of great lawyers, and Bill ranks up at the top. That is why he is in the position that he is in today as U.S. attorney for the Northern District.

Bill has long and distinguished legal career, beginning when he joined the Air Force back in 1978. He was a member of the JAG corps then and served his country in a very valiant way. Bill continued in private practice for many years in South Carolina and then moved to Atlanta, practiced with the very prestigious law firm of King & Spalding in Atlanta, which is now one of his partners, former U.S. Attorney General Griffin Bell, among many other distinguished individuals.

Bill is certainly recognized by his peers as being an outstanding lawyer. He was given the ABA rating, unanimous rating, of well-qualified. So the gold standard certainly has been met in Bill's case.

Bill has the support of his family who I would like to take just a minute to introduce—his wife Betsy, his sons Charles and Scott, who are with him today. And Bill will be quick to tell you that his success is due, in large part, to the great support that he has had from his family.

I could not be more proud of an individual being nominated by my nonpartisan Committee that selects nominees. Senator Miller has a representative on that committee, and it was the unanimous recommendation of that Committee that Bill Duffey be recommended for this position.

So I am very pleased to be here this morning to support my good friend, an outstanding lawyer and an outstanding American, Bill Duffey, for this confirmation.

Thank you.

Senator CRAIG. Senator, thank you very much. Now, let me turn to Senator Zell Miller of the State of Georgia.

PRESENTATION OF WILLIAM S. DUFFEY, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA, BY HON. ZELL MILLER, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator MILLER. Thank you, Mr. Chairman. I too am honored to be here with my good friend and colleague, Senator Chambliss, to present to you William S. Duffey, who has been nominated by President Bush to be the United States District Judge for Georgia's Northern District, where I live. And we present him today as a fellow Georgian who has impeccable credentials and who has strong support from all corners of the State of Georgia.

Mr. Duffey is no stranger to this esteemed Committee. On September the 4th, 2001, President Bush made an outstanding choice by nominating Mr. Duffey to serve as United States attorney for the Northern District of Georgia, and the Senate confirmed his nomination unanimously. President Bush has done well again by now nominating Mr Duffey to serve as United States District Judge for Georgia's Northern District.

When I look at William Duffey and look at his career, I am reminded of what Booker T. Washington once said, that "nothing ever comes to one that is worth having, except as a result of hard work." William Duffey is a man who has worked very, very hard indeed and who has served our State and our Nation well. I know that he will do the same outstanding job for our country as District Judge.

Senator Chambliss has already mentioned to you some of his background, a member of the very prestigious King & Spalding law firm in Atlanta, and he also talked about his experience before that. But while at King & Spalding, Mr. Duffey was involved in two very high-profile internal investigations, one for EF Hutton, after the investment firm pleaded guilty to fraud charges, and the other for Exxon, after the Valdez disaster.

And then from 1994 to 1995, he served as deputy independent counsel in charge of the Arkansas fees of the Whitewater investigation. I mention this because you can see Mr. Duffey is no stranger when it comes to handling and being involved in tough issues and tough cases.

I would also like to note that Mr. Duffey has served as chair of the Paul Coverdell Leadership Institute. The institute was started by predecessor, the great Senator Paul Coverdell, in 1996, as a way to find good leaders for elective office.

Mr. Duffey comes before you today not only highly recommended by me and by Senator Chambliss, but also by many, many others. I have heard some of his peers describe him as very fair. I have heard him described as a straight shooter. I have heard him described as a man of extraordinary ethics.

I know Mr. Duffey well, and I know that he has the skill and the ability to serve ably in this judicial position. I hope that this Committee and the full United States Senate will give their vote

of approval to William Duffey today, just as they did, so wisely, back in 2001.

Thank you, Mr. Chairman.

Senator CRAIG. Zell, thank you very much for that opening statement.

Now, let me turn to my colleague and partner from Idaho, Senator Mike Crapo, to speak on behalf of William Myers for the Ninth Circuit.

PRESENTATION OF WILLIAM GERRY MYERS III, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, BY HON. MICHAEL CRAPO, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAPO. Thank you very much, Mr. Chairman, Senator Craig.

I appreciate the opportunity to be with you here today to recommend the confirmation of William G. Myers, III, to the Ninth Circuit Court of Appeals. I have visited with many of the members of the Committee personally and appreciate this opportunity to meet with the Committee in its open session.

On May 15th, President Bush nominated Bill Myers to serve as a judge on the Ninth Circuit Court of Appeals, the same court where I clerked following my law school experience. Bill would serve the vacancy created on the Circuit Court last year when Judge Thomas Nelson, one of the two Idaho-based judges on the Ninth Circuit, became a senior judge on the court.

The entire Idaho delegation supports this nomination, and we appreciate your leadership, Senator Craig, in moving this nomination through the Judiciary Committee.

Bill has the experience and the temperament which will allow him to serve with distinction on the Ninth Circuit. As legislative counsel to our former colleague, Senator Alan Simpson, of Wyoming, Bill gained firsthand experience with the very nominations process he is now going through.

Bill's experience as assistant to the Attorney General during the first Bush administration will serve him well also. I understand that his boss at that time, former Attorney General Dick Thornberg, has endorsed Bill's nomination.

From there, Bill continued in the Executive Branch, serving as deputy general counsel for programs at the Department of Energy. Bill returned to the private sector in 1993, serving as an advocate for Federal lands issues and also as a member of a Boise law firm, where he handled litigation, legislative advocacy and transactional work.

As an attorney, he has handled cases from the State Court level to the U.S. District Court level, as well as at the United States Supreme Court. Most recently, Bill served as solicitor for the U.S. Department of Interior, a position for which Senate confirmation was required and achieved.

Bill is also a past vice Chairman of the Public Lands and Land Use Committee of the American Bar Association Section on Environment, Energy and Resources. As those of us from the Western States that make up the Ninth Circuit know, this knowledge and firsthand experience with energy, agriculture and public lands issues is certainly an asset, if not a requirement, for a judge sitting

on the Ninth Circuit Court of Appeals. The public lands expertise is particularly key for a State like Idaho, where 64 percent of the almost 34 million acres is now owned by the Federal Government.

I am pleased to recognize the broad bipartisan support we are seeing for this nomination from people who have worked with Bill and know him well. This includes support from President Bush, many members of Congress, former Senator Alan Simpson, former U.S. Attorneys General Thornberg and Barr, President Jimmy Carter's Interior Secretary and four-term Idaho Governor, Democrat Cecil Andrus, and President Clinton's ambassador to Ireland and two-term Wyoming Governor, Democrat Mike Sullivan.

I am also aware that there are certain special interest groups that are expressing some criticism over this nomination. It is important to note that this criticism is largely over the policies advocated by the administrations or the clients that Bill served as a requirement of his job. Such criticism has no bearing on the experience, temperament or overall qualification of Bill Myers himself to capably serve on the Ninth Circuit.

The size and caseload of the Ninth Circuit makes it even more critical that vacancies are filled immediately. The Ninth Circuit serves a population well over a third larger than the next-largest circuit. The Ninth Circuit has the largest caseload of any circuit. The median time for completing a case decision in the Ninth Circuit is 14.4 months. The same appeal would take 9.9 months in the Fifth Circuit or 8.5 months in the Second Circuit. I have the fullest confidence that Bill Myers possesses the qualities necessary to capably serve the citizens of the Ninth Circuit, and I join my colleague, Senator Craig, in urging this Committee to vote favorably on this nomination.

Thank you very much, Mr. Chairman.

Senator CRAIG. Mike, thank you very much for that testimony.

We have been joined by our colleague, Senator Feingold. Do you wish to make any opening comment prior?

Senator FEINGOLD. Mr. Chairman, I will defer and ask questions.

Senator CRAIG. Thank you, Mike.

We will proceed then with our first panel. Let me then, prior to calling any of our nominees forward, turn to the senior Ranking Member on this Committee, Senator Pat Leahy.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. As I said, I know the other Senators have to come and go. You and I have to stay, so I waived my opening statement earlier.

This is interesting what is happening. I recall, after the attacks of September 11th, and the anthrax letters in October 2001, we continued to work. I held hearings, even though I had received one of those letters, we held hearings in the Capitol. One of the nominees actually had to drive here because the flights were cancelled, and we are now under major inconvenience in the Senate with office buildings closed. One will open in a few hours, the others not until later this week or next week.

So I commend all of the Senators on both sides of the aisle who have worked hard to make sure we can go forward with this, and I commend you, Mr. Chairman, for doing it.

I look forward to the testimony of William Myers to the Ninth Circuit Court of Appeals, and I think that it is extremely important that this Committee in the Senate realize what is involved with our advise and consent. It is important to recognize the Senate has already confirmed 171 of President Bush's judicial nominees. In the 17 months, when the Democrats were in the majority, I was Chairman, we confirmed 100 of President Bush's nominees. In the other 20 months that the Republicans have been in charge, another 71 were confirmed. So we have confirmed them in record number. That is in sharp contrast to the way President Clinton's nominees were held up, usually, if one or two people objected.

Every one of the judges, no matter what level they are, they have lifetime appointments. They are going to have a major impact on our Nation. William Myers has been nominated to the Circuit Court with an expansive reach. The Ninth Circuit, as the Chairman knows better than anybody else sitting here right now, encompasses Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington.

In addition to the tens of millions of people within those States, there are hundreds of millions of acres of public land. It plays an enormous role—the court does—in interpreting and applying a broad range of environmental rules and protections. Now, those rules are important not just to us today, but to millions of Americans yet to be born and have come under increasing attack, I believe, during this administration. We want to know if Mr. Myers' nomination fits into the pattern of actions by the President to roll back our environmental laws.

What are at stake are environmental protections which can be struck down. Taxpayers do not pay polluters, according to the extreme expanse of the Takings Clause that some judges have begun to adopt. we would want to know what Mr. Myers' understanding of the Takings Clause is and whether he intends to force taxpayers to pay whenever a regulation affects land use in some ways and what standards will he use in deciding these matters.

We want to know whether he endorses an interpretation of the Constitution that prevents citizens from suing their States if there are environmental violations. What is at stake, of course, is whether citizens can sue for environmental protection.

In the era of ballooning Government deficits and cuts in environmental enforcement budgets, there is much at stake if courts eliminate or minimize the critical role of private attorneys general, who are needed to ensure that polluters are complying with Federal mandates.

A judge has a duty to enforce protections imposed by environmental laws. The Senate has a duty to make sure that we do not put judges on the bench whose activism and personal ideology will prevent fair and impartial adjudication.

The President has sent the Senate an unusually large number, and I have been here for 30 years, both Republican and Democratic Presidents, and I have never seen such a large number of judicial nominees who seem to be ends oriented in their approach to the

law. Some appear to be too extreme, and they have not gone through.

Now, we are seeing nominees who many feel are being awarded lifetime appointments to the Federal Courts as part of a spoil system for those who are well-connected, and I am sad to report that many of my concerns about the President's nominees have already been borne out in the short time they have been on the bench. They have shown them selves to be judicial activists and ends oriented, issuing troubling opinions on civil rights, constitutional liberties and environmental protections. It was a Bush-appointed judge who dissented from the Circuit Court's decision to enjoin logging while a lawsuit by environmental groups challenged the implementation of a U.S. Forest Service restoration project involving timber sales in the Sierra Nevada Mountains.

So I look at his record. I want to explore his time at the Department of Interior. I notice that his hometown newspaper, his hometown newspaper, where they know him best, opined that the solicitor at the Department of Interior, "Myers sounds less like an attorney and more like an apologist for his old friends in the cattle industry." These are matters that we have to explore.

Now, there are those who have supported him. There are also letters of opposition from more than 90 groups or advocates for civil rights, disability rights, senior citizens, women's rights, human rights, Native Americans and the environment, actually, the unprecedented step of the National Congress of American Indians, representing more than 250 Tribal Governments has come out in opposition to the nominee.

I know that Mr. Myers has never tried a jury case, never served as counsel in any criminal litigation, as far as I know, and that is probably why the American Bar Association gave him its lowest passing grade. We have to think about that.

So, to go back to something that the Chairman said, we are operating under unusual circumstances, and I do not think we have held a hearing in this hearing room before. The Senate has. I think Chairman Sensenbrenner, and Mr. Conyers, and the members of the House Judiciary deserve a lot of thanks for their hospitality and also the staff, both the Republican and Democratic staff, of the House who suddenly have these interlopers, I appreciate what they have done.

So thank you, Mr. Chairman.

Senator CRAIG. Thank you, Senator, for that opening statement.

Senator Kennedy has now joined us. Do you wish to make an opening statement?

Senator KENNEDY. No. Thank you very much.

Senator CRAIG. Well, then let me ask our nominee for the Ninth Circuit, William Myers, to please come forward.

Mr. Myers, while you are standing, let me administer the oath. Would you please raise your right hand.

Do you swear that the testimony you are about to give before the Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. MYERS. I do.

PRESENTATION OF WILLIAM GERRY MYERS III, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT, BY HON. LARRY CRAIG, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator CRAIG. Please be seated.

Before I ask you to make any opening comments you would wish to make and to introduce your family, I will make my opening comment in your behalf.

To my colleagues, and to those of you assembled, I have the honor and the pleasure this morning of chairing a Committee while it considers the nomination of my good friend, William G. Myers, III, to be a Circuit Judge on the Ninth Circuit.

Bill, welcome to the Committee. I trust you will find it friendly, but probably very probative. I look forward to hearing your testimony. I would also like to welcome another good friend who has already given his testimony, Mike Crapo, who has joined us this morning, and he expressed on behalf of all of the Idaho Congressional delegation its unanimity of support on behalf of Bill Myers.

Bill Myers was nominated by the President on May 15th, 2003, for this extraordinary opportunity to serve the United States as a Circuit Judge. As you know, our State of Idaho, as Senator Leahy mentioned, resides within the Ninth Circuit. Bill's chambers will be in Boise, Idaho. Once confirmed, Bill will fill the vacancy created by Judge Thomas Nelson. Senator Crapo has already spoken to the senior judge and his taking senior status. Judge Nelson has served our country and the Ninth Circuit very honorably.

I feel Bill's experience in the three branches of Government will serve him well as a judge.

First, he served this body—by that I mean the Senate—when he was lured to Washington, D.C., by Senator Alan Simpson. One of Bill's key responsibilities was to staff Senator Simpson as a member of this Committee, including nominations to the very court to which Bill now aspires. Bill staffed the nomination of Judge Stephen Trott of the Ninth Circuit, whose chambers are also in Idaho. And Al Simpson endorses the nomination of Bill, and I ask that his letter become a part of the record.

Second, after working in the Senate, Bill began his first tour of duty in the Executive Branch, first, as an assistant to Attorney General of the United States Dick Thornberg. Senator Crapo has already mentioned that, and later, as deputy general counsel for Programs at the Department of Energy. Former Attorneys General Dick Thornberg and William Barr endorse Bill's nomination, and I will make their letters a part of the record.

Recently, Bill completed another appointment to the Executive Branch as solicitor at the Department of Interior, where he was the third-ranking official in the Department and in charge of over 300 attorneys. President Carter's Secretary of Interior and of course Governor of Idaho, Cecil Andrus, endorses Bill's nomination, and his letter will become a part of the record.

Let me also add to that record letters from Quapaw Tribe of Oklahoma, the Chickasaw Nation, bipartisan letters from 15 attorneys general, the Governor of our State, Governor Dirk Kempthorne, and Michael Dennis, director of Conservation, Real Estate and Private Lands for the Nature Conservancy. I believe those let-

ters demonstrate a phenomenally broad base of support that William Myers received.

Third, as a private practitioner, Bill has represented clients before the justice of the peace and the Justices of the Supreme Court in a wide variety of litigation and transactional matters. This diversity of practice is important. It has imbued Bill with one of the fundamental precepts of our constitutional system of Government, separation of powers. Perhaps nowhere is the importance of this bedrock principle more important than in the judiciary. Because judges are not elected and serve for life, they have the greatest opportunity to usurp the authority of the other branches. I am convinced that Bill understands and respects, from years of firsthand experience, the constitutional role given to each branch.

As Thomas Jefferson said, I had rather ask an enlargement of power from the Nation, where it is found necessary, than to assume it by judicial construction which would make our powers boundless.

Now, let me tell you a little bit about Bill Myers, as I know him personally. I came to know Bill well when he represented the cattlemen and women in the early 1990's. He was a reasonable and effective voice for his clients who comprise the single-largest sector of America's agricultural economy, but the call of the West became too strong to ignore, and Bill and his family moved to Idaho.

Returning to private practice in one of the country's preeminent law firms, Bill continued to dutifully represent his clients, as all lawyers must. When the Bush-Cheney administration took office, Bill told me he was willing to again serve the public, and I prevailed upon him to seek and become the solicitor at the Department of Interior. The President nominated Bill for that post, with the advice and the consent of the Senate. He took office on July of 2001.

A few critics of this administration's natural resource policies would have you believe that Bill should not be confirmed. They bandy about perceived wrongs, in my opinion, but all they have demonstrated, with certainty, is two truths; that, first, the solicitor is the chief legal officer in a department that is controversial in every administration by the very nature of its mission and, second, these critics desire to capture the judiciary by opposing nominees who do not display activist tendencies that might work to their advantage.

The second point I wish to remind these critics of the sage advice of a Founding Father by the name of Alexander Hamilton, when he wrote that "Considered men of every description ought to prize whatever will tend to beget or fortify integrity and moderation in the courts, as no man can be sure that he may not be tomorrow the victim of a spirit of justice by which he may be a gainer today."

Critics of the nomination purposely confuse the appropriate role of the lawyer and the judge by suggesting that Bill Myers has been a strong advocate of his clients. He will continue to advocate from the bench, they would suggest. Of course, they offer nothing but supposition in support of this logic.

If their theory were correct, no practitioner would be qualified to serve the judiciary, and their fears are allayed by a fair review of Bill's public service. His record as solicitor shows balance and

mainstream decisionmaking; for example, opposition to trespass to innholders in the National Parks of Alaska, empowerment of trespass livestock on the Federal lands of Nevada, expansion of a national monument in New York, support for reinternment of Native American remains, recognition of tribal boundary rights in New Mexico, record penalties for failure of companies to pay gas royalties, support of settlements of trial water rights claims, enhanced payments of royalties on the outer continental shelf.

Bill brought to the Office of the Solicitor the skills he honed in the private practice and in public service. He displayed the integrity, intelligence and temperament essential in good governing and absolutely critical in good judging.

The President recognized these qualities again by nominating Bill Myers to this judgeship. Leaders in the field of law have written to the Committee supporting Bill's qualifications to be a circuit judge. I ask that their letters become a part of the record. They include Congressman Henry Hyde, Wyoming Supreme Justice Marilyn Kite, attorney general of the State of Idaho, Lawrence Wasden, Chairman Carol Dinkins, for the ABA Committee of the Federal Judiciary.

I thank you. I am proud to bear witness on behalf of Bill Myers to be the next Ninth Circuit judge in Idaho. Presidents, Attorneys General, Cabinet Secretaries, Senators and enumerable clients have all reposed special trust and confidence in Bill's integrity, his intelligence and his temperament. These qualities are the standards the Senate has used to measure the worth of judicial nominees since the founding of this great Republic. I wholeheartedly recommend that we consent to this nomination, and I offer this testimony to all of my colleagues and to the entire Senate.

With that, Mr. Myers, let us turn to you for any opening comments you would like to make, and I would trust that you might want to introduce that marvelous family of yours.

STATEMENT OF WILLIAM GERRY MYERS III, NOMINEE TO BE CIRCUIT JUDGE FOR THE NINTH CIRCUIT

Mr. MYERS. Thank you, Senator. I appreciate that opportunity, and I want to thank the Committee for holding this hearing. It is an inconvenience for you to come to the House side, given current events. I know it is extraordinary, and I appreciate that.

I would take advantage of the chance to introduce my family, if I might. Behind me, I have my mother and father, Ruby and Gerry Myers, and seated next them are my wife, Sue Myers, my daughters Kate and Molly, and then next to Kate is my mother-in-law Pat Benzer, and behind her, my sister-in-law, Linda Benzer.

Senator CRAIG. Thank you. We welcome you to the Committee. Please proceed.

Mr. MYERS. I have no opening statement, Senator. I stand for questions.

[The biographical information of Mr. Myers follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

   William Gerry Myers III (a/k/a Bill Myers)

2. **Address: List current place of residence and office address(es).**

   Residence: Arlington, VA

   Office: U.S. Department of the Interior
   Office of the Solicitor
   1849 C Street, NW, Room 6352
   Washington, DC 20240

3. **Date and place of birth.**

   July 13, 1955, Roanoke, VA

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   Married to Susan Benzer Myers (nee Susan Louise Benzer)
   Spouse is unemployed.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   College of William and Mary, September 1973 - May 1977; B.A. May 1977
   University of Denver College of Law, September 1978 - May 1981; J.D. June 1981

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

Entity	Dates	Position	Location
Ukrop's Supermarkets, Inc.	6/77-8/78	Ass't Frozen Foods and Dairy Manager	Richmond, VA
f/k/a May Department Stores	12/78-12/78	Santa Claus	Denver, CO
University of Denver, College of Law	2/79-5/79	Law Library Filing Clerk	Denver, CO
f/k/a Mulligan, Reeves, Teasley & Joyce	8/79-2/80	Law Clerk	Denver, CO
f/k/a Hultin & Driver	2/80-3/80	Law Clerk	Denver, CO
Isaacson, Rosenbaum, Woods & Levy	3/80-5/81	Law Clerk	Denver, CO
f/k/a Holmes & Starr	5/81-7/81	Law Clerk	Denver, CO
Davis & Cannon, f/k/a Burgess & Davis	8/81-1/84	Associate Attorney	Sheridan, WY
U.S. Senator Alan K. Simpson (Ret.)	2/85-6/89	Legislative Counsel	Washington, DC
U.S. Department of Justice	6/89-2/92	Assistant to the Attorney General	Washington, DC
U.S. Department of Energy	2/92-2/93	Deputy General Counsel for Programs	Washington, DC
National Cattlemen's Beef Association and the Public Lands Council	5/93-7/97	Director, Federal Lands and Executive Director (respectively)	Washington, DC
Holland & Hart, LLP	8/97-7/01	Of Counsel	Boise, ID
U.S. Department of the Interior	7/01-Present	Solicitor	Washington, DC

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

None.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Former member of two collegiate scholastic fraternities: Omicron Delta Epsilon (Economics), Alpha Kappa Delta (Sociology)

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

- Sheridan County Bar
- Wyoming State Bar
- Denver Bar Association
- Colorado State Bar
- Idaho State Bar
- District of Columbia Bar
- American Bar Association: Vice-Chairman, Public Lands Committee, Section of Environment, Energy, and Resources. Approx. 1998 - 10/25/00

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

I do not belong to organizations active in lobbying before public bodies. I belong to First United Methodist Church, Boise, Idaho and Lewinsville Presbyterian Church, McLean, Virginia; the Chesterbrook Swim & Tennis Club, McLean, Virginia; and the Hulls Grove Homeowners Association, Boise, Idaho.

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the**

reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

- Colorado Supreme Court, October 26, 1981
- United States District Court for the District of Colorado, October 26, 1981
- Wyoming Supreme Court, May 3, 1982
- United States District Court for the District of Wyoming, Dec. 15, 1983
- United States Court of Appeals for the Tenth Circuit, January 25, 1984
- District of Columbia Court of Appeals, March 9, 1987
- Supreme Court of the United States, January 8, 1990
- United States Court of International Trade, March 26, 1993
- Idaho Supreme Court, September 25, 1997
- United States District Court for the District of Idaho, September 25, 1997
- United States Court of Appeals for the Ninth Circuit, December 7, 1999
- United States District Court for the District of Columbia, March 5, 2001

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Books, Articles, Columns or Publications

Title/Subject	Publication	Date
Andrus v. Shell Oil Co.: The Marketability Standard and the Oil Shale Exception	58 Den. L.J. 453	1981
Advice and Consent on Trial: The Case of Robert H. Bork	66 Den. U.L. Rev. 1	1989
The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork	17 Hastings Const. L.Q. 399	1990
Reforming the American Civil Justice System	5 Geo. J. Legal Ethics 879	1992

Title/Subject	Publication	Date
Environmental Command and Control: The Snake in the Public Lands Grass	Farmers, Ranchers and Environmental Law 191	Roger Clegg ed. 1995
Western Ranchers Fed Up with Feds	Forum for Applied Res. & Pub. Pol.	Winter '96 at 22
Water Allocation	Idaho Cattle Association "Line Rider"	October 1997
Environmentalists More Concerned with Membership than Environment	Idaho Wool Grower Bulletin	November/ December 1997
Environmentalists More Concerned with Membership than Environment	Idaho Cattle Association "Line Rider"	December 1997
Grazing Legislation Roundup	Holland & Hart Environment and Resources Update	January 1998
Kids, Cars and Commodities	Idaho Cattle Association "Line Rider"	February 1998
Kids, Cars and Commodities	Idaho Wool Grower Bulletin	February 1998
Public Service in the New Year	ABA Public Lands and Land Use Committee Newsletter	February 1998
New Forest Service Policy Restricts Access to Roadless Areas	Holland & Hart Environment and Resources Update	February 1998
How to Turn a Big Buck into a Little Dough	Idaho Wool Grower Bulletin	March 1998
Forest Road Closure Loses Path in Woods	Jackson Hole Guide	March 11, 1998
Forest Road Policy is Lost in the Woods	High Country News	March 19, 1998

Title/Subject	Publication	Date
How to Turn a Big Buck into a Little Dough	Idaho Cattle Association "Line Rider"	April 1998
Property Rights in the Legislature	Idaho Wool Grower Bulletin	April 1998
Property Rights in the Legislature	Tellsride Daily Planet	April 22, 1998
Litigation - Happy Environmentalist Need Reform	Moab Time-Independent	April 30, 1998
Ranchers and Other Endangered Species	Idaho Wool Grower Bulletin	May 1998
Clean Water Act Section 401	The Advocate	May 1998
Ranchers and Other Endangered Species	Idaho Cattle Association "Line Rider"	June 1998
Supreme Court Rejects Challenges to Forest Plan	Holland & Hart Environment and Resources Update	July 1998
Clean Water Act § 401	Western Livestock Reporter	July 8, 1998
Clean Water Act § 401	Western Livestock Reporter	July 15, 1998
Clean Water Act § 401	Western Livestock Reporter	July 22, 1998
Feedlots in the Spotlight	Idaho Wool Grower Bulletin	August 1998
Ninth Circuit Calms Troubled Waters for Federal Land Permittees	Holland & Hart Environment and Resources Update	August 1998
To Tell the Truth	Idaho Wool Grower Bulletin	September 1998

Title/Subject	Publication	Date
To Tell the Truth	Western Livestock Journal	September 7, 1998
Laws About Truth do Matter	Recorder Herald	September 17, 1998
To Tell the Truth	Idaho Cattle Association "Line Rider"	October 1998
Administration Rolls out Feedlot Strategy	Holland & Hart Environment and Resources Update	October 1998
Supreme Court Rejects Challenges to Forest Plan	Idaho Wool Grower Bulletin	November 1998
Uncommon Sense	Idaho Cattle Association "Line Rider"	December 1998
Uncommon Sense	Idaho Wool Grower Bulletin	December 1998
Protecting Your Water Rights	Idaho Wool Grower Bulletin	January 1999
Clash of the Titans	Idaho Wool Grower Bulletin	February 1999
Protecting Your Water Rights	Idaho Cattle Association "Line Rider"	February 1999
BLM Charges Ahead on Mining Regulations	Holland & Hart Environment and Resources Update	February 1999
Road Warriors	Holland & Hart Environment and Resources Update	February 1999

Title/Subject	Publication	Date
TMDLs and the Big Picture: Federal Authority over Nonpoint Source Pollution	Course Materials, ABA 17th Annual Water Law Conference	February 25-26, 1999
State Grazing Lands Decision Requires a Close Read	Idaho Wool Grower Bulletin	April 1999
State Grazing Lands Decision Requires a Close Read	Idaho Cattle Association "Line Rider"	Summer 1999
Road Construction is up in the Air	Associated General Contractors of Idaho Magazine	August 1999
Forest Service Proposes Overhaul of Planning Process	Holland & Hart Environment and Resources Update	October 1999
Idaho Court Grants Federal Government's Claim to Wilderness Water	Holland & Hart Environment and Resources Update	October 1999
Supreme Court to Hear Federal Land Ranching Case	Holland & Hart Environment and Resources Update	October 1999
Supreme Court to Hear Federal Land Ranching Case	ABA Public Lands and Land Use Committee Newsletter	January 2000
Protecting Your Property Without a Fence	Idaho Cattle Association "Line Rider"	Spring 2000
Whoa, NOAA	Idaho Wool Grower Bulletin	March 2000
Supreme Court Hears Arguments in Federal Lands Ranching Case	Idaho Wool Grower Bulletin	April 2000
Raining on EPA's Parade	Holland & Hart Environment and	May 2000

Title/Subject	Publication	Date
	Resources Update	
Raining on the Regulators' Parade	Idaho Cattle Association "Line Rider"	Summer 2000
Is a Conservation Easement Right for You?	Range Magazine	Summer 2000
Raining on the Regulators' Parade	Idaho Wool Grower Bulletin	June 2000
Managing Federal Lands Creatively	Idaho Cattle Association "Line Rider"	Fall 2000
Study Materials	Course Materials, ALI-ABA Federal Lands in the West: Embarking on the New Millennium	October 5-6, 2000
Why Not Change Rallying Cry to "Condos for Cows?"	Nevada Appeal	October 20, 2000
Condos for Cows	Headwaters News	October 24, 2000
Condos for Cows	Livingston Enterprise	October 26, 2000
Whoa, NOAA	Idaho Cattle Association "Line Rider"	Winter 2000
The Department of the Interior's Role in National Emergencies	Natural Resources and the Environment (ABA Section Magazine)	Winter 2002

Letters to Newspaper Editors

Title/Subject	Newspaper	Date
What price grazing on public rangelands?	The Washington Times	July 4, 1993
Raising costs will drive out ranchers	The Arizona Republic	July 7, 1993

Title/Subject	Newspaper	Date
Raising grazing fees won't fatten the treasury	The Denver Post	August 26, 1993
Grazing fee hike will hurt ranchers	The Des Moines Register, The Baltimore Sun, Newsday, Greensboro News & Record	On or about August 26, 1993
Cattlemen have a beef	Los Angeles Daily News	August 26, 1993
Grazing fees: Babbitt wrong; plan will hurt land, treasury	The Phoenix Gazette	August 27, 1993
Ranchers crying foul, not wolf, at proposal to increase grazing fees	Rocky Mountain News	August 29, 1993
Cattle vs. condos	Christian Science Monitor	August 31, 1993
Ranchers can't afford grazing fee plan	The New York Times	September 1, 1993
Babbitt's grazing fees increase will hurt ranching, public lands	The Salt Lake Tribune	September 6, 1993
Babbitt's plan flawed	The Daily Oklahoman	October 8, 1993
Babbitt's proposal hit	St. Petersburg Times	October 9, 1993
Small Ranchers Can't Pay More for Arid Lands	The New York Times	November 10, 1993
Too late?	The Las Vegas Review-Journal	November 10, 1993

Title/Subject	Newspaper	Date
Grazing issue proves how rigid national environmental groups are	The Washington Times	January 9, 1994
Wolves on the Range	The Washington Post	May 21, 1994
Wildlife Federation's Anti-Grazing Report Not Good Science	The Arizona Republic	August 16, 1994
Grazing Land	Chicago Tribune	January 1, 1995
Grazing pays its own way	USA Today	February 6, 1995
GOP West test	Chicago Tribune	February 10, 1995
Violence Grows Against Ranchers	The New York Times	July 15, 1995
Let ranchers keep working	USA Today	July 26, 1995
Don't Fence Us Out	The Wall Street Journal	August 7, 1995
Ranchers will still share	Pittsburgh Post-Gazette	August 7, 1995
Ranchers Haven't Been Linked to Bombings	National Law Journal	August 14, 1995
Livestock Grazing Act	Chicago Tribune	August 23, 1995
Realities of Ranching	The Omaha World-Herald	August 23, 1995
There is a proper federal role in Western land management	The Washington Times	August 30, 1995

Title/Subject	Newspaper	Date
Changes in grazing rule	Los Angeles Times	September 8, 1995
Conservation mantle rests uneasily on shoulders of green alarmists	The Washington Times	May 9, 1996
The real story down on the range	The Washington Times	September 8, 1996
Uncle Sam unleashes wolves on livestock, but he doesn't pay for damages	The Washington Times	September 12, 1996
Bet Your Boots We're Environmentalists	The New York Times	September 27, 1996
Cowboys of the West - - Don't Blame Livestock Grazing for Pacific Northwest Flooding	The Seattle Times	February 8, 1997
Readers surely saw column as nonsensical	Rocky Mountain News	April 13, 1997
Environmental lawsuits excessive	The Idaho Statesman	April 27, 1998
Home on the Range: Discouraging Words	The Wall Street Journal	October 6, 1999
Bush/Cheney importance	Western Livestock Journal	January 1, 2001
Agency lawyer has obligation to speak on behalf of a client	The Idaho Statesman	November 26, 2002

Speeches (copies are not available; I speak from talking points and extemporaneously, not from prepared text. I have not retained copies of the talking points.)

Subject	Event	Location	Date
Current Issues Concerning Public Land Management	International Society for Ecological Modeling	Providence, RI	8/11-15/96

Subject	Event	Location	Date
Environmental Command and Control: The Snake in the Public Land Grass	ABA Conference on Developments and Trends in Public Land, Forest Resources and Mining Law	Scottsdale, AZ	3/8-9/96
Policies and Actions Needed to Sustain Grazing Land Landscapes and Lifestyles	11th Annual Grazing Lands Forum	Washington, DC	12/5/96
Grazing on Federal Lands	Federal Lands Task Force Meeting	McCall, ID	10/10/97
Estate Planning for Ranchers	Estate Planning Seminar	Ft Collins, CO	11/3/97
Update on Grazing Issues	Idaho Cattle Association Convention	Coeur d'Alene, ID	11/7/97
Update on Grazing Issues	Idaho Wool Growers Convention	Sun Valley, ID	11/15/97
Grazing Issues Update	Oregon Cattlemen's Association Convention	Bend, OR	11/22/97
Ranchers' View of Rangeland Reform Regulations	BLM Standards and Guidelines Workshop	Denver, CO	12/9/97
Grazing Issues Update	National Cattlemen's Beef Association Convention	Denver, CO	2/4/98
Interior Columbia Basin Ecosystem Management Plan	Idaho Council on Industry and Environment	Boise, ID	2/12/98
Public Lands Issues	Idaho Agricultural Summit	Boise, ID	2/18/98

Subject	Event	Location	Date
Grazing Reform Legislation	Idaho Bankers Association Agricultural Forum	Twin Falls, ID	5/7/98
Feedlot Issues	Arizona Cattle Feeders Seminar	Phoenix, AZ	9/3/98
Concentrated Animal Feeding Operations	Holland & Hart/Idaho Cattle Association Seminar	Twin Falls, ID	9/30/98
Opportunities in the Practice of Law	Idaho State Bar, Young Lawyers Division, CLE	Boise, ID	11/16/98
Concentrated Animal Feeding Operation Issues	Association of Idaho Cities Environmental Forum	Boise, ID	2/3/99
TMDLs and the Big Picture: Federal Authority over Nonpoint Source Pollution	ABA 17th Annual Water Law Conference	San Diego, CA	2/25-26/99
Legal Issues and Careers	Law Day School Outreach Program	Eagle, ID	4/30/99
Endangered Species Act Issues	Wyoming Stock Growers' Association Convention	Casper, WY	6/99
Use of Federal Lands	Boise Leadership Conference	Boise, ID	6/12/99
Estate Planning for Ranchers	Western Folklife Center Meeting	Elko, NV	1/29/00
Update on Federal Lands Issues	AgAmerica/Western Farm Credit Bank Meeting	Washington, DC	6/7/00

Subject	Event	Location	Date
Public Lands Council v. Babbitt	ALI-ABA Conference: Federal Lands in the West: Embarking on the New Millennium	Jackson, WY	10/5-6/00
Update on Federal Lands Task Force	Idaho Cattle Association Convention	Boise, ID	11/16/00
Public Lands Grazing	University of Idaho Wildlife/Range 493 Class	Moscow, ID (via audio/visual link)	11/30/00
Federal Lands Task Force Working Group Report	Idaho State Land Board Meeting	Boise, ID	12/12/00
Endangered Fish	Idaho Cattle Association Meeting	Salmon, ID	1/8/01
Federal Regulation of Concentrated Animal Feeding Operations and the View from the Hill	Idaho State Bar Continuing Legal Education Program	Boise, ID Pocatello, ID	3/9,16/01
Federal Lands Task Force Working Group	Idaho Environmental Forum	Boise, ID	1/18/01
Endangered Species Update	National Cattlemen's Beef Association Annual Meeting	San Antonio, TX	1/31/01
FOIA Litigation Update	National Cattlemen's Beef Association Annual Meeting	San Antonio, TX	2/1/01
Federal Lands Task Force Working Group Report	Idaho State Land Board Meeting	Boise, ID	2/13/01
Federal Lands Task Force Working Group Report	Priest Lake Management Committee	Priest Lake, ID	3/21/01

Subject	Event	Location	Date
Federal Regulation of Concentrated Animal Feeding Operations and the View from the Hill	Idaho Cattle Ass'n Seminar on Feedlot Regulations	Boise, ID	3/29/01
Clean Water Act Update	Montana Water Law Seminar	Helena, MT	4/18/01
Federal Land Legal Issues	Conference of Western Attorney Generals Annual Conference	Sun Valley, ID	7/15/01
Indian Water Law Update	Indian Water Law Conference	St. George, UT	10/11/01
Department of the Interior Mining Issues Update	National Mining Association Mining Lawyers Conference	Key West, FL	10/19/01
View from D.C.: Inside the New Interior Department	Idaho Environmental Forum Meeting	Boise, ID	1/15/02
Mining Issues in the Department of the Interior	Society for Mining, Metallurgy & Exploration Conference	Phoenix, AZ	2/25/02
Department of the Interior Legal Issues	American Bar Association Conference on Environmental Law	Keystone, CO	3/14/02
Department of the Interior Legal Issues	Conference of Western Attorney Generals Annual Conference	Monteray, CA	7/29/02
Public Land Law	Department of Justice Public Lands and Natural Resources Law Seminar	Columbia, SC	9/5/02

Subject	Event	Location	Date
Federal Administrative Process	Holland & Hart Partners' Meeting	Vail, CO	9/27/02
Public Land Grazing	Western Watersheds Project Conference	Boise, ID	10/10/02
Department of the Interior Legal Issues	American Bar Association Conference	Portland, OR	10/11/02
National Wildlife Refuge Systems Centennial	Long Lake National Wildlife Refuge Centennial Celebration	Long Lake NWR, North Dakota	10/19/02
Department of the Interior Grazing Issues Update	Nevada Cattlemen's Association Annual Meeting	Winnemucca, NV	11/15/02
Grazing Issues	Idaho Cattle Association Conference	Sun Valley, ID	11/19/02
Department of the Interior Mining Issues Update	Northwest Mining Association Conference	Spokane, WA	12/6/02
Introduction to the Solicitor's Office	D.C. Bar Luncheon	Washington, DC	2/6/03
Mining Update	Ad Hoc Mining Interests Breakfast Meeting	Anchorage, AK	3/12/03

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Generally excellent health. Date of last physical exam, March 27, 2003

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

None.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

Not Applicable.

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

Appointed by the Idaho State Land Board to serve on the State of Idaho Federal Lands Working Group, 10/99 - 3/01.

17. **Legal Career:**

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

a. **Associate Attorney**, Davis & Cannon (f/k/a Burgess & Davis) 8/81 - 1/85; 40 S. Main Street, Sheridan, WY 82801

General civil litigation practice including appellate advocacy.

Legislative Counsel for Senator Alan K. Simpson (ret.), 2/85-6/89; 261 Dirksen Senate Office Building, Washington, DC 20510

Served as principal adviser to Senator Alan Simpson of Wyoming on public land issues including energy development, national forests, water development and allocation, wilderness areas and wildlife habitat. Also counseled the Senator for his duties on the Senate Judiciary Committee pertaining to the Constitution, judicial nominations, antitrust and criminal law matters.

Assistant to the Attorney General, 6/89-2/92; U.S. Department of Justice, Office of the Attorney General, 10th and Constitution Avenue, NW, Washington, DC 20530

Prepared the Attorney General for his responsibilities as chairman pro tem of the President's Domestic Policy Council. Represented the Attorney General on departmental working groups and joined him in advising the President and the Cabinet. Issues included global climate change, wetlands policy, Clean Air Act amendments, the National Energy Strategy, civil justice reform and tort reform.

Deputy General Counsel for Programs, 2/92-2/93; U.S. Department of Energy, Office of the General Counsel, 1000 Independence Avenue, SW, Washington, DC 20585

Served as DOE's legal adviser on matters pertaining to international energy, government contracting, civilian nuclear programs, power marketing and intervention in state regulatory proceedings. Supervised 35 staff attorneys as well as various field counsel and private counsel under contract with DOE.

Executive Director, Public Lands Council and **Director, Federal Lands**, National Cattlemen's Beef Association, 5/93-7/97; 1301 Pennsylvania Avenue, NW, Suite 300, Washington, DC 20004

Principal adviser and representative on all aspects of public land law, regulations and governmental processes affecting federal land ranching. Regular congressional, administrative and media interaction. Worked closely with allied industry organizations. Managed all Public Lands Council business.

Of Counsel, Holland & Hart, LLP, 8/97-7/01; 101 South Capitol Boulevard, Suite 1400, Boise, ID 83702

Represented a broad range of commodity-based clients regarding public lands, natural resources and environmental law. Practice encompassed state and federal litigation, appeals, administrative proceedings and lobbying.

Solicitor, U. S. Department of the Interior, 07/01 - present, 1849 C Street, NW, Room 6352, Washington, DC 20240

Appointed by President George W. Bush, with the advice and consent of the Senate, to serve as the chief legal officer and third-ranking official at the Department of the Interior. Responsible for managing over 300 attorneys, a $47 million budget, and 19 offices nationwide. Responsible for providing legal advice to the Secretary and Interior's offices and bureaus on issues such as endangered species, water rights and allocation, on and offshore minerals, Indian affairs, federal land grazing, national parks and wildlife refuges.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

b. 1. Civil practice in both public and private sectors. See also responses to 17(a), (b)(2), and (c).

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

b. 2. My typical former clients can be divided into public sector and private sector clients. Public sector clients include high ranking government officials in the executive and legislative branches of the federal government. Generally, my role was and is to provide advice to these senior officials as part of their decision-making process and typically related to natural resources and environmental matters, with a particular focus on natural resources managed by the federal government. I also provided wide-ranging advice on other legal issues in order to facilitate the senior officials' performance of his or her duties. In the private sector, I typically represented small and medium-sized companies in federal and administrative litigation and as a lobbyist before Congress and the Administration. I also assisted clients with transactional matters.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

c. 1. I occasionally appeared in court on behalf of clients in both the public and private sector. Much of my litigation practice has involved a motions practice and settlement. The frequency of my appearances in court varied. I was more actively involved in courtroom matters when associated with private law firms from 1981-1985 and from 1997-2001 and in my current position. I did not appear in court while serving as a Legislative Counsel to Senator Simpson, as an Assistant to the Attorney General for the United States, or as a Deputy General Counsel at the Department of Energy.

2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;
(c) other courts.

c. 2. I would estimate that 70% of my court appearances have been in federal court, 20% in state courts of record, and 10% in other courts and administrative tribunals.

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

c. 3. 100% civil litigation.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

c. 4. I first started practicing law 22 years ago; it is difficult to recall the precise number of cases I have tried to verdict or judgment. I estimate the number to be approximately 12, of which I estimate that I was sole counsel in 75% of the cases. This number includes some summary judgments and default judgments as well.

5. What percentage of these trials was:
(a) jury;
(b) non-jury.

c. 5. 100% non-jury trials.

18. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your**

participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

18. Cases listed chronologically:

(1) **CITATION OR DOCKET NUMBER AND DATE: *Matthew Johnston, et al. v. Board of Trustees, School District #1 West, et al.*, 661 P.2d 1045 (Wyo. 1983)**

CASE SUMMARY: My clients were parents who brought suit for a declaratory judgment and to enjoin placing a plan for a four-day school week into operation. The district court denied injunctive relief and held the plan to be lawful. I filed an appeal on behalf of my clients.

PARTY(IES) REPRESENTED: Matthew & Lorraine Johnston, Dan & Jeanne Scott, Richard & Susan Davis, Dan & Jan Daniels, James & Bette McLaughlin, Jerry Meyer

NATURE OF MY PARTICIPATION: I handled the representation at both the trial and appellate levels, including research, briefing and oral arguments.

FINAL DISPOSITION OF THE CASE: The Wyoming Supreme Court ruled in favor of my clients and held the plain meaning of the statute revealed the legislature's intent and that the board of trustees was not authorized to adopt a four-day school week.

DATES OF REPRESENTATION: 1982-83

COURT, JUDGE(S): Supreme Court of Wyoming. Rooney, C.J.; Raper, Thomas, Rose & Brown, J.J.

NAME, ADDRESS, PHONE NUMBER OF CO-COUNSEL: None

NAME, ADDRESS, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Rex O. Arney
Brown Drew & Massey
45 East Loucks Street
Sheridan, Wyoming 82801
307-673-8565

(2) CITATION OR DOCKET NUMBER AND DATE: *Matter of Estate of Reed*, 672 P.2d 829 (Wyo. 1983).

CASE SUMMARY: My client filed a petition for probate of a will alleging that a tape recording found in decedent's home was a valid holographic will. The trial court refused to admit the tape recording as a will.

PARTY(IES) REPRESENTED: Margaret F. Buckley

NATURE OF MY PARTICIPATION: I represented the plaintiff/petitioner, pro bono, on appeal. I researched and wrote briefs and argued the case in the state supreme court. I do not recall whether I filed the initial petition for probate of the will.

FINAL DISPOSITION OF THE CASE: The Wyoming Supreme Court affirmed the trial court holding that a holographic will must be entirely in the handwriting of the testator. See also 42 A.L.R. 4th 167 (1985).

DATE OF REPRESENTATION: 1982-1983

COURT, JUDGE(S): Supreme Court of Wyoming. Rooney, C.J.; Thomas, Rose, Brown and Cardine, J.J.

NAME, ADDRESS, PHONE NUMBER OF CO-COUNSEL: None

NAME, ADDRESS, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

R. Brooke Holstedt
1328 Liberty Road SE
Salem, Oregon 97302-0018
503-363-8959

(3) CITATION OR DOCKET NUMBER AND DATE: *Public Lands Council v. Babbitt*, 929 F. Supp. 1436 (D. Wyo. 1996).

CASE SUMMARY: My clients facially challenged the Department of the Interior regulations affecting grazing on lands administered by the Bureau of Land Management. Plaintiffs sought declaratory and injunctive relief.

PARTY(IES) REPRESENTED: District Court: Public Lands Council, National Cattlemen's Association.

NATURE OF MY PARTICIPATION: I was serving as "in-house counsel" for Public Lands Council and National Cattlemen's Beef Association at the time of the action. I facilitated review of filings and client participation in the case in concert with co-counsel. Attended hearing as co-counsel.

FINAL DISPOSITION OF THE CASE: Interior regulations were vacated in key respects by the district court. Certain of those vacated regulations were eventually considered and upheld by the U.S. Supreme Court.

DATE OF REPRESENTATION: 1995-1996

COURT, JUDGE(S): U.S. District Court for the District of Wyoming. District Judge Clarence Brimmer.

NAME, ADDRESS AND PHONE NUMBER OF CO-COUNSEL:

Connie Brooks
999 18th Street, Suite 1605
Denver, Colorado 80202
303-297-9100

Calvin Ragsdale
20 E. Flaming Gorge Way
Green River, Wyoming 82935
307-875-3235

NAME, ADDRESS, PHONE NUMBER OR PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Gary Randall
U.S. Department of Justice
601 D. Street, NW, Room 3128
Washington, DC 20004
202-305-0444

Laura Brown
U.S. Department of the Interior
Office of the Solicitor
1849 C Street, NW, Rm 6414
Washington, DC 20240
202-208-4444

(4) CITATION OR DOCKET NUMBER AND DATE: *Idaho Watersheds Project, et al. v. Hahn*, CV-97-00519-BLW (D. Idaho 1999).

CASE SUMMARY: Environmental groups challenged Bureau of Land Management issuance of grazing permits for failure to comply with statutory and regulatory requirements. Groups also sought completion of new management plan and new environmental impact statement.

PARTY(IES) REPRESENTED: Owyhee Resource Area Permittees, et al.

NATURE OF MY PARTICIPATION: I represented permittees as intervenors-defendants in preliminary injunction and summary judgment phase of the trial.

FINAL DISPOSITION IN THE CASE: District Court granted partial summary judgment to environmental groups. Following a substitution of counsel, the District Court ultimately issued a permanent injunction but did not halt all cattle grazing. Ninth Circuit affirmed on appeal.

DATE OF REPRESENTATION: 11/97 - 5/99

COURT, JUDGE(S): U.S. District Court for the District of Idaho; District Judge Lynn Winmill

NAME, ADDRESS, PHONE NUMBER OF CO-COUNSEL:

Murry Feldman
Holland & Hart
101 S. Capitol Blvd.
Suite 1400
Boise, ID 83702

NAME, ADDRESSES, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Idaho Watersheds Project:
Laird J. Lucas
1320 W. Franklin Street
Boise, Idaho 83701
208-342-7024

U.S. DOI: Nick Woychick/DOJ
877 W. Main Street, Suite 201
Boise, Idaho 83707
208-334-1211

(5) CITATION OR DOCKET NUMBER AND DATE: *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000).

CASE SUMMARY: Ranching organizations appealed from a Tenth Circuit decision reversing the district court and upholding certain grazing regulations affecting livestock operations on federal lands under the control of the Bureau of Land Management.

PARTY(IES) REPRESENTED: AgAmerica Farm Credit Bank and 24 other farm credit institutions.

NATURE OF MY PARTICIPATION: In the Supreme Court phase of this litigation, I was counsel of record on an amicus curiae brief in support of petitioner ranching organizations. The farm credit institutions raised concerns over impact of challenged regulations on their lending policies.

FINAL DISPOSITION OF THE CASE: Supreme Court ruled in favor of respondent Secretary of the Interior.

DATES OF REPRESENTATION: 1999-2000

COURT, JUDGE(S): U.S. Supreme Court. Justice Breyer delivered the opinion of the Court.

NAME, ADDRESS, PHONE NUMBER OF CO-COUNSEL:

Marcy Glenn
Holland & Hart
555 17th Street, Suite 3200
Denver, Colorado 80202
303-295-8000

NAME, ADDRESS, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Petitioners:
Timothy S. Bishop
Mayer Brown
190 S. LaSalle Street
Chicago, Illinois 60603-3498
312-701-7829

Respondents:
Edwin S. Kneedler
Solicitor General's Office
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-3261

(6) CITATION OR DOCKET NUMBER AND DATE: *Forest Guardians v. U.S. Forest Service*, CIV99-615M/KBM (D.N.M. Jan. 18, 2001).

CASE SUMMARY: Freedom of Information Act litigation seeking escrow waivers submitted to the Forest Service by livestock operators with Forest Service permits. The escrow waivers provide financial and personal information to the Forest Servcie when grazing permits are used by permittees to secure loans from private-sector lenders.

PARTY(IES) REPRESENTED: AgAmerica Farm Credit Bank, Western Farm Credit Bank, Farm Credit Bank of Texas, AgriBank Farm Credit Bank, Ninth Farm Credit District

NATURE OF MY PARTICIPATION: My clients intervened in the litigation as defendants and cross-plaintiffs seeking to prevent additional release of information to Forest Guardians that my clients considered protected from release by FOIA and Forest Service regulations.

FINAL DISPOSITION OF THE CASE: The district court granted our summary judgement motion to set aside the agency's decision, denied plaintiff's motion for summary judgment and denied the agency motion to dismiss our cross-claim.

DATE OF REPRESENTATION: 1999-2001

COURT, JUDGE(S): U.S. District Court for the District of New Mexico, District Judge Mecham.

NAME, ADDRESS, PHONE NUMBERS OF CO-COUNSEL: None

NAME, ADDRESS, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Forest Guardians:
Richard Meitz
P.O. Box 8749
Santa Fe, New Mexico 87504
505-757-8431

Forest Service:
John Zavitz
National Advocacy Center
Department of Justice
1620 Pendleton Street
Columbia, South Carolina 29201
803-544-5100

(7) **CITATION OR DOCKET NUMBER AND DATE:** ***Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).**

CASE SUMMARY: Petitioner SWANCC questioned whether the Clean Water Act authorized the Corps to exercise permit authority over dredge-and-fill operations in non-navigable, isolated, intrastate wetlands.

PARTY(IES) REPRESENTED: American Farm Bureau Federation, National Cattlemen's Beef Ass'n, North Dakota Farm Bureau

NATURE OF MY PARTICIPATION: I was counsel of record on clients' amicus curiae brief in support of SWANCC. Clients argued the impact of a contrary ruling on normal farming and ranching operations.

FINAL DISPOSITION OF THE CASE: Supreme Court ruled in favor of SWANCC and my clients.

DATE OF REPRESENTATION: 2000-2001

COURT, JUDGE(S): U.S. Supreme Court. Chief Justice Rehnquist delivered the opinion of the Court.

NAME, ADDRESS, PHONE NUMBERS OF CO-COUNSEL:

Marcy Glenn
Holland & Hart
555 17th Street, Suite 3200
Denver, Colorado 80202
303-295-8000

NAME, ADDRESS, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Petitioner:
Timothy S. Bishop
Mayer Brown
190 S. LaSalle Street
Chicago, Illinois 60603-3498
312-701-7829

Respondent:
Lawrence Wallace
Solicitor General's Office
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
202-514-2211

(8) CITATION OR DOCKET NUMBER AND DATE: *United States v. Navajo Nation*, 123 S. Ct. 1079 (2003).

CASE SUMMARY: The question presented was whether the Court of Appeals properly held that the United States is liable to the Navajo Nation for up to $600 million in damages for breach of fiduciary duty in connection with the Secretary's approval of a mineral lease without finding that the Secretary had violated any specific duty in the controlling statute or its regulations.

PARTY(IES) REPRESENTED: United States Department of the Interior

NATURE OF MY PARTICIPATION: As senior supervising attorney in the Department of the Interior, I was responsible for advice to the Secretary regarding the Department's position on the petition for writ of certiorari and the brief on the merits.

FINAL DISPOSITION OF THE CASE: Supreme Court ruled in favor of petitioner United States.

DATES OF REPRESENTATION: 2002-2003

COURT, JUDGE(S): U.S. Supreme Court. Justice Ginsburg delivered the opinion of the Court.

NAME, ADDRESS, PHONE NUMBER OF CO-COUNSEL:

Edwin S. Kneedler
U.S. Department of Justice
Office of the Solicitor General
10th and Constitution Ave., NW
Washington, DC 20530
202-514-3261

NAME, ADDRESS, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Paul Frye
500 4th Street, NW, Suite 400
Albuquerque, N.M. 87102
505-243-1443

(9) CITATION OR DOCKET NUMBER AND DATE: *United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126 (2003).

CASE SUMMARY: The question presented was whether the Court of Federal Claims had jurisdiction over the Tribe's suit against the United States for breach of fiduciary duty to manage land and improvements held in trust for the Tribe but occupied by the Government.

PARTY(IES) REPRESENTED: United States Department of the Interior

NATURE OF MY PARTICIPATION: As senior supervising attorney in the Department of the Interior, I was responsible for advice to the Secretary regarding the Department's position on the petition for writ of certiorari and the brief on the merits.

FINAL DISPOSITION OF THE CASE: Supreme Court ruled in favor of respondent Tribe.

DATE OF REPRESENTATION: 2002-2003

COURT, JUDGE(S): U.S. Supreme Court. Justice Souter delivered the opinion of the Court.

NAME, ADDRESSES PHONE NUMBER OF CO-COUNSEL:

Gregory G. Garre
Office of the Solicitor General
U.S. Department of Justice
10th and Constitution Ave., NW
Washington, DC 20530
202-514-3261

NAME, ADDRESS, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Robert C. Brauchli
6650 North Oracle Road, Suite 110
Tucson, Arizona 85704
520-742-2191

(10) CITATION OR DOCKET NUMBER AND DATE: *Inyo County, California, et al. v. Paiute-Shoshone Indians of the Bishop Community, et al.*, No. 02-281, U.S. Supreme Court.

CASE SUMMARY: Questions presented are whether state law-enforcement officers had authority to seize tribal records pursuant to a state court-issued warrant, whether an Indian Tribe is a "person" entitled to sue under 42 U.S.C. 1983, and if the Tribe is entitled to sue, whether state law-enforcement officers are entitled to qualified immunity from that suit.

PARTY(IES) REPRESENTED: United States as amicus curiae (specifically, U.S. Dept. of Interior)

NATURE OF MY PARTICIPATION: As senior supervising attorney in the Department of the Interior, I was responsible for advice to the Secretary regarding the Department's position on the merits of our brief supporting the Tribe in part as to sovereignty from seizure of records and supporting the respondents in part as to inapplicability of 42 U.S.C. 1983 to tribes.

FINAL DISPOSITION OF THE CASE: The Supreme Court vacated the Ninth Circuit judgment and held that the Tribe may not sue under §1983 to vindicate sovereign rights at issue in this case. The Court remanded the case for jurisdictional consideration of the Tribe's action to establish a sovereign right to be free from state criminal processes.

DATES OF REPRESENTATION: 2002-2003

COURT, JUDGE(S): U.S. Supreme Court. Justice Ginsburg delivered the opinion of the Court.

NAME, ADDRESS, PHONE NUMBER OF CO-COUNSEL:

Edwin S. Kneedler
U.S. Department of Justice
Office of the Solicitor General
10th and Constitution Ave., NW
Washington, DC 20530
202-514-3261

NAME, ADDRESS, PHONE NUMBER OF PRINCIPAL COUNSEL FOR EACH OF THE OTHER PARTIES:

Petitioner:
John D. Kirby
9747 Business Park Avenue
San Diego, California 92131
858-621-6244

Respondent:
Reid Chambers
1250 Eye Street, NW, Suite 1000
Washington, DC 20005
202-682-0240

19. Legal Activities: **Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

The following activities describe non-litigation legal activities. The list is by no means exhaustive, rather it is illustrative of some of the non-litigation matters I have handled for clients.

Sandia Pueblo Boundary Dispute:

In 1748, the King of Spain issued a royal grant to the Pueblo of Sandia setting its boundaries. The 1848 Treaty of Guadalupe Hidalgo recognized the property rights conferred upon the Pueblo Indians by Spain. In the 20th Century, a dispute arose as to the location of the eastern boundary of the Sandia Pueblo, placing in dispute approximately 10,000 acres west of the crest of Sandia Peak under the administration of the U.S. Forest Service. One of my predecessors, Solicitor Ralph Tarr, issued an opinion stating that the 10,000 acres were not part of the Pueblo. Litigation ensued in the U.S. District Court for the District of Columbia. The Tarr Opinion was vacated. A subsequent opinion by another predecessor, Solicitor John Leshy, concluded that the original survey of the eastern boundary excluding the 10,000 acres was clearly erroneous and should be set aside and, if necessary, a resurvey should be conducted. The parties reached a settlement that required congressional ratification. When I entered into office, Congress had not ratified the settlement agreement and various parties were either encouraging or discouraging me to issue a third opinion of the Office of the Solicitor. I analyzed the facts and the law and

worked with the parties involved in the dispute. I testified on behalf of the Department before the Senate Energy and Natural Resources Committee generally in support of legislation. The matter was concluded by enactment of legislation resolving the dispute to the satisfaction of the Pueblo and other parties.

Surface Management of Hardrock Mining

Upon assumption of my duties as Solicitor, I learned that five separate lawsuits had been filed regarding hardrock mining regulations promulgated in 2000 relating to the definition of "unnecessary and undue degradation" of federal lands in the course of hardrock mining. I undertook an exhaustive review of those regulations with the assistance of staff attorneys and issued an opinion. I concluded that relevant legal authority required the deletion of one particular criterion from the definition of unnecessary or undue degradation because that criterion lacked statutory authority. I also concluded that attempts to define and apply other provisions on an ad hoc basis could not continue in the absence of Departmental regulations defining key terms, said terms having not been defined at any time in the last 25 years.

Non-Litigation Private Practice

An example of the type of activities I undertook in private practice was my representation of a ranch corporation in southern Idaho. The ranch held grazing permits on Bureau of Land Management (BLM) land. The U.S. Air Force obtained statutory authority to expand its nearby training range at Mountain Home Air Force Base onto the BLM's lands where the grazing allotments were. As a result, livestock operations were severely impacted by loss of access to these BLM lands. On behalf of the ranch, I negotiated with the Air Force and BLM for compensation and use of other BLM lands for grazing. My representation included successful lobbying of Congress for statutory provisions that protected my client as part of the implementation of the training range expansion.

Lobbying

I have lobbied Congress on behalf of clients while serving as Executive Director of the Public Lands Council and as Director of Federal Lands for the National Cattlemen's Beef Association and while in private practice.

Legal Policy

While serving as the Assistant to the Attorney General, I worked on legal aspects of public policy and spent a significant amount of time advancing the President's initiative on civil justice reform. The matter was taken up by the President's Council on Competitiveness that published 50 specific recommendations to improve the civil justice system by reducing the excessive cost and long delays associated with civil litigation. The

effort resulted in an Executive Order on civil justice reform, proposals for changes to the Federal Rules of Civil Procedure and the distribution of model state-amendments.

While working for United States Senator Alan K. Simpson (Ret.) and the Department of Justice, I engaged in number of other legal policy issues on diverse topics such as immigration reform, judicial nominations, antitrust amendments, Clean Air Act amendments, and the national energy strategy.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

Source	Vested Amount (as of 3/31/03)	Date
Holland and Hart LLP 401(k)	$ 42,455	2015 or later

I have made no arrangements to be compensated in the future for any financial or business interests other than the source listed above.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I will advise the Clerk of Court and chambers staff of those matters in which I have participated in previous employment that are covered by applicable conflicts laws and rules. I will be attentive to those potential conflicts and instruct court and chambers staff to do likewise. I will also seek to identify financial conflicts of interest. It is my understanding that software is available to assist in this effort. Of course, I will also familiarize myself with relevant statutes and canons of judicial ethics that apply to recusals and disqualification. In the event that I need ethics advice, I will consider seeking written advice from the Committee on Codes of Conduct of the Judicial Conference. The General Counsel's Office of the Judicial Conference may also be a source of advice or further direction.

I do not foresee potential conflicts of interests from my financial arrangements because all of my investments in the stock market are through mutual funds that are widely held. Categories of litigation that may present potential conflicts of interest would be those cases in which I have participated as Solicitor and that are considered on appeal by the Ninth Circuit following my potential investiture. I will be sensitive to any appearance of a conflict of interest and will consider recusal from those cases that may give rise to an appearance of conflict.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

No.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

See form AO-10 attached to Section II of this questionnaire.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

See attached net worth statement.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

While in private practice in Idaho, my law firm hosted fund-raising receptions for the senatorial campaign of Sen. Mike Crapo and the gubernatorial campaign of Gov. Dirk Kempthorn for their reelections in 1998. I had the primary responsibility within the firm for arranging the receptions.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year 2002

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Myers III, William G	Court of Appeals, 9th Circuit	5/19/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge (Nominee)	5. ReportType (check appropriate type) (•) Nomination, Date 5/15/2003 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2002 to 4/30/2003
7. Chambers or Office Address Department of the Interior 1849 C Street, NW, Room 6352 Washington, DC 20240	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Of Counsel	Holland & Hart LLP
2.	Chairman, State Affairs and Natural Resources Subcommittee	Boise Metro Chamber of Commerce
3.	Chairman	Federal Lands Task Force Working Group

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	1998	Holland & Hart LLP Incentive Savings Plan (401(k)), former law firm pension to be paid from vested portion of plan upon age of retirement
2.	1998 .	Holland & Hart LLP Retirement Plan, merged with Incentive Savings Plan on 1/1/02

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2001	Holland & Hart LLP compenstion	$70,779

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Myers III, William G	5/19/2003

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.		Exempt

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.		Exempt	

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	National City Mortgage Co.	Mortgage on Residential Rental, Boise, Idaho (Pt. VII, Line 28)	M

FINANCIAL DISCLOSURE REPORT
Page 1 of 2

Name of Person Reporting	Date of Report
Myers III, William G	5/19/2003

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. (if not exempt from disclosure) (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. Templeton World Fund IRA	A	Dividend	J	T	exempt				
2. American Mutual Fund	A	Dividend			exempt				
3. EuroPacific Growth Fund	A	Dividend			exempt				
4. Growth Fund of America	A	Dividend			exempt				
5. New Perspective Fund	A	Dividend			exempt				
6. Centenial Money Market	A	Interest	J	T	exempt				
7. Holland & Hart 401(k)									
8. -Dodge & Cox Balanced Fund	A	Dividend	J	T	exempt				
9. -Fidelity Diversified International Fund	A	Dividend	J	T	exempt				
10. -Fidelity Divident Growth Fund	A	Dividend	J	T	exempt				
11. -Fidelity Low Priced Stock Fund	A	Dividend	J	T	exempt				
12. A.G. Edwards SEP IRA									
13. -Deleware Group Decatur Fund	A	Dividend	J	T	exempt				
14. -Delaware Group Trend Fund	A	Dividend	J	T	exempt				
15. American Funds Accounts									
16. -EuroPacific Growth Fund #1		None	J	T	exempt				
17. -EuroPacific Growth Fund #2		None	J	T	exempt				
18. -Growth Fund of America #1		None	J	T	exempt				

1. Income/Gain Codes: (See Columns B1 and D4) A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: (See Columns C1 and D3) J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes (See Column C2) Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market; U = Book Value; V = Other; W = Estimated

FINANCIAL DISCLOSURE REPORT
Page 2 of 2

Name of Person Reporting	Date of Report
Myers III, William G	5/19/2003

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
19. -Growth Fund of America #2		None	J	T	exempt				
20. -Smallcap World Fund #1		None	J	T	exempt				
21. -Smallcap World Fund #2		None	J	T	exempt				
22. -Washington Mutual Investors Fund #1	A	Dividend	J	T	exempt				
23. -Washington Mutual Investors Fund #2	A	Dividend	J	T	exempt				
24. -Bond Fund of America #1	A	Dividend	J	T	exempt				
25. -Bond Fund of America #2	A	Dividend	J	T	exempt				
26. -U.S. Government Securities Fund #1	A	Dividend	J	T	exempt				
27. -U.S. Government Securities Fund #2	A	Dividend	J	T	exempt				
28. Residential Rental, Boise, Idaho (2002 $319,000)	E	Rent	N	S	exempt				
29. Idaho Central Credit Union	A	Interest	J	T	exempt				
30. Department of the Interior Federal Credit Union	A	Interest	J	T	exempt				
31. National Life Insurance Co. Whole Life	A	Dividend	J	T	exempt				
32. U.S. Savings Bonds		None	J	T	exempt				

1. Income/Gain Codes:	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
(See Columns B1 and D4)	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes:	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
(See Columns C1 and D3)	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
(See Column C2)	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Myers III, William G	5/19/2003

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Myers III, William G	5/19/2003

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature  Date May 19, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	9	572	—	Notes payable to banks-secured		0	
U.S. Government securities-add schedule	2	400	—	Notes payable to banks-unsecured		0	
Listed securities-add schedule		0		Notes payable to relatives		0	
Unlisted securities--add schedule	86	363	—	Notes payable to others		0	
Accounts and notes receivable:		0		Accounts and bills due	2	801	—
Due from relatives and friends				Unpaid income tax		0	
Due from others				Other unpaid income and interest		0	
Doubtful				Real estate mortgages payable-add schedule	247	000	—
Real estate owned-add schedule	319	000	—	Chattel mortgages and other liens payable		0	
Real estate mortgages receivable		0		Other debts-itemize:		0	
Autos and other personal property	85	767	—				
Cash value-life insurance	3	699	—				
Other assets itemize:							
Money Market Account		294	—				
Retirement Savings Plan (401(k))	42	455	—				
Thrift Savings Plans	123	044	—	Total liabilities	249	801	—
				Net Worth	422	729	—
Total Assets	672	530	—	Total liabilities and net worth	672	530	—
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor		0		Are any assets pledged? (Add schedule)		No	
On leases or contracts	7	185		Are you defendant in any suits or legal actions?		No	
Legal Claims		0		Have you ever taken bankruptcy?		No	
Provision for Federal Income Tax		0					
Other special debt		0					

Financial Statement Schedule

U.S. Government Securities Schedule

EE Savings Bonds	$ 2,400

Unlisted Securities Schedule

SEP IRA, consisting of	$ 11,401
Delaware Group Trend Fund	5,427
Delaware Group Decatur Fund	5,974
Templeton World Fund	$ 12,172
529 Account FBO dependent #1, consisting of	$ 31,395
EuroPacific Growth Fund	3005
Growth Fund of America	4728
Smallcap World Fund	4793
Washington Mutual Investors Fund	6133
Bond Fund of America	9677
US Government Securities Fund	3059
529 Account FBO dependent #2, consisting of	$ 31,395
EuroPacific Growth Fund	3004
Growth Fund of America	4728
Smallcap World Fund	4794
Washington Mutual Investors Fund	6133
Bond Fund of America	9677
US Government Securities Fund	3059

Real Estate Schedule

Appraised value of Boise, Idaho residence	$319,000

Real Estate Mortgages Payable Schedule

Mortgage held by National City Mortgage Company, payable on Boise, Idaho residence	$247,000

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

   I have engaged in various times in pro bono legal representation of the disadvantaged. Specific instances include the following:

   - Representation of client in litigation before the state supreme court seeking to probate a will in the form of a tape recording.
   - Participation in the Idaho Volunteer Lawyers Program as volunteer lawyer providing pro bono legal advice to low-income individuals referred to me by the Idaho State Bar. Upon referral, I would contact the applicant, discuss the facts and the law, and provide advice as appropriate.
   - While not specifically provided to the disadvantaged, my pro bono efforts also included significant participation as a volunteer on a State of Idaho task force.

   I do not have records from every year for time spent in pro bono activities. Records of my pro bono work for four years provide some insight:

Year	Hours
1998	69
1999	114
2000	196
2001	116 (annualized)

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of**

membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

I belonged to the Boy Scouts of America. I do not recall when I joined the Boy Scouts. I ended my membership in approximately 1971. I have not tried to change the Boy Scouts' policy that limits its membership to males under a certain age.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

It is my understanding that ad hoc selection commissions are created in Idaho when vacancies occur for the United States District Court for the District of Idaho. The Idaho congressional delegation recommended four individuals, including me, for nomination to the U.S. Court of Appeals for the Ninth Circuit.

I first became aware of the judicial selection process when I worked on judicial nominations for Senator Alan Simpson who was a member of the Senate Judiciary Committee. Last year, I expressed interest to the White House Counsel's Office regarding a judgeship in the United States District Court for the District of Idaho or the U.S. Court of Appeals for the Ninth Circuit. Subsequently, Judge Thomas Nelson on the Ninth Circuit announced his intention to take senior status in 2003. I learned that the President wanted to nominate a judge to replace Judge Nelson. I had additional discussions with members of the Office of the White House Counsel. I then informed the Senators from Idaho of my interest. In February 2003, the Senators submitted four names to the White House for consideration, including me. I subsequently was interviewed by members of the Office of Legal Policy of the Department of Justice and the White House Counsel's Office. Approximately five weeks later, I received a letter from the Assistant Attorney General for the Office of Legal Policy informing me that my name was among those the Department of Justice would consider recommending to the President for this nomination. The letter enclosed a series of questionnaires from the White House and the United States Senate. I answered the questionnaires. I was then interviewed by the FBI and Office of Legal Policy counsel. Later, I was notified by the White House Counsel's office that the President intended to nominate me, which he did on May 15, 2003.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably**

be interpreted as asking how you would rule on such case, issue,or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

A judge must dispassionately and fairly apply the law to the facts in the case at bar. The law may be derived from the Constitution, statutes, treaties, regulations, and precedent. In the first instance, the judge must determine threshold issues: is an actual case or controversy pending; do the parties have standing; does jurisdiction exists; is the venue proper. Only after the judge applies these well-established precepts may he or she adjudicate disputes in a manner consistent with the power granted by Article III of the Constitution. Judges must discern the fair meaning and intent of the laws they interpret without substituting their individual political philosophy for the will of the legislature.

Senator CRAIG. Well, thank you very much for consenting to be nominated, first, Bill, to the Ninth Circuit. It is a controversial court. In fact, some judges on the Supreme Court would suggest that it has become the most dysfunctional Circuit Court in the Nation. I guess they measure that on the number of cases brought from the Circuit to the Supreme Court that they have overturned.

You have heard, by opening statements of my colleague, Senator Leahy, that there are questions of your record brought by a variety of groups from across the country. So, in my first 10 minutes of questioning, let me touch on a couple of areas that I would like you to respond to.

Too often we hear various interest groups, opposed to particular judicial nominees, issue sound-bite attacks that are backed up by nothing more than probably the shrillness of their rhetoric. Such is the case, I think, with you, Mr. Myers, as being viewed by some as anti-environmental. So let me proceed with questions in that area in my first round.

For example, Mr. Myers, have you not worked as a volunteer in seven different national parks, probably logging more hours of total volunteerism than any nominee we have ever had before this Committee?

Mr. MYERS. Well, I certainly don't know about the other nominees, but, yes, you are correct, Senator. I have spent a fair amount of time volunteering for both the National Park Service and occasionally for the national forest in the U.S. Forest Service System. I think, as I looked back in preparation for this hearing, at the time, I was surprised myself as to the amount of time I have put in. Over the last 15 years, I have averaged about 12 days a year in volunteer work on such things as campground cleanups, trail maintenance, visitor services and information, back country patrols and the like. It has been a wonderful opportunity to get outside and enjoy the grandeur of our National park system and do a little bit for the Park Service.

Senator CRAIG. I hope you took your daughters with you.

Mr. MYERS. Most of that was before children, when I had the time to go.

[Laughter.]

Senator CRAIG. All right. As Interior Department solicitor, you successfully settled numerous cases brought by environmental groups against the Federal Government.

Can you tell us about a few of the high-profile disputes that you settled in favor of environmental groups, such as the Penobscot—I can usually handle Western Indian names, but not always—Penobscot River matter in Maine, that $49-million settlement with Shell Oil based on its activities in the Gulf and the expansion of Governor's Island National Monument in New York Harbor. Touch on those different cases, if you would, please, for the record.

Mr. MYERS. The first one that you mentioned, Senator, involved the Lower Penobscot River, which is home to the Penobscot Indian Nation. It also happens to be the location of eight power projects, hydropower projects, and three dams. It also would have been, historically, the run for Atlantic salmon and some fish that are perhaps not as charismatic, such as the Atlantic eel and the Atlantic

shad. Because of the dams, those passages were blocked to the migrating salmon.

A deal was worked out, while I was at the Department of Interior as solicitor, with the involvement within the Department of the Park Service, the Bureau of Indian Affairs, the Fish and Wildlife Service, and the Indian Nation, the hydro interests that were present on the river and the State of Maine. We were able to reach an accord and establish a system of going forward whereby those three dams will either be removed or significantly altered to allow for fish passage.

We also provided for compensation and mitigation to the Indian Nations for any impact that might have on them, and I think it was a good example of a project which, by virtue of collaboration and a lot of time around the table, hammered out quite an extraordinary deal to bring about an expansion of that fish passage.

The other one I believe you mentioned was the Shell Oil matter in the Gulf of Mexico. It came to light that the company had been flaring gas from one of its off-shore platforms without permission of the Federal Government and without keeping adequate records of that flaring. Once that was discovered, we obviously were quite concerned at the Department of Interior, worked with the Department of Justice, and as a result of that, we were able to reach a settlement which involved a record payment in the history of the Minerals Management Service by a company for these types of violations. It was $49 million in payment for the illegal activity, for the loss of the natural gas, for the failure to maintain adequate records. In addition, the company agreed going forward to get its recordkeeping in order and to no longer flare that gas illegally. The coffers of the Treasury were enhanced by $49 million.

The final example that you raised was Governor's Island National Monument, which is in New York Harbor. It is a wonderful island that most people only see perhaps as tourists when they travel between the mainland or Manhattan Island and Ellis Island and the Statue of Liberty. It was originally a fortress built for the protection of the harbor and the river, and includes Castle Williams and Fort Jay that date back to the early 1800's.

It has been in Federal hands for some 200 years, but the decision was made by President Clinton to place a portion of the island in National Monument status. When this administration came in, we supported that designation, but we discovered that because of a statute that was on the books, the statute required, in spite of the monument designation, that the island be sold with a right of first refusal to either the City or State of New York. We were able to work with the City and State of New York, arrange for the transfer in order to meet the legalities of the statute, in essentially a simultaneous transfer back that not only maintained the original monument, but actually increased the acreage to obtain some additional property that was crucial for the monument's protection.

Senator CRAIG. Well, thank you very much.

Let me point out that in the *Colvin* v. *Snow*, and several other similar cases, you specifically authorized the regional solicitor in Nevada to seek enforcement actions against ranchers who refused to pay applicable grazing fees for their use of public lands, and you did not support the Government's pursuit of a preliminary injunc-

tion against a farmer that had destroyed Marble Creek, one of the last natural streams flowing out of the National Forest System lands in California's White Mountains, by entering onto public lands with a bulldozer and replacing the sediments in the creek with a pipeline.

Would you speak to those examples of actions you took as solicitor.

Mr. MYERS. Certainly, Senator. I appreciate that question. Both of them deal with ranching on BLM lands.

The first one was a standard trespass action, if you will. Occasionally—rarely, thankfully—ranchers who utilize Federal lands will allow their livestock to trespass off of the area that is designated for them by the Bureau of Land Management or the U.S. Forest Service. When that happens, it is a trespass because those livestock are grazing where they should not be.

In the Colvin matter, that came to our attention. It was brought to my attention, and I said, certainly, let's prosecute this. It is important I think to establish that so that other ranchers who might consider similar trespass actions know that that is not permitted.

The second example is a little more dramatic, frankly. That was entitled, a case, of *Harris* v. *United States* in which a rancher, while administrative litigation and settlement discussions were pending, decided to exercise self-help and took a bulldozer to a creek, approximately a quarter-mile stretch of the creek, wiping out obviously the riparian habitat, destroying the creek, and he then went on to install a pipeline to divert the water for his livestock use. In order to access the creek, he took out about—oh, I don't remember the exact reach—but a 15-year-old fence that was between his bulldozer and the creek.

When BLM personnel discovered this, they immediately came to us. We went to the Department of Justice, requested that a motion for a preliminary injunction be filed in the Federal Court to enjoin Rancher Harris from further such activity to prohibit him from approaching that creek with anything more than a shovel, in order to maintain a ditch right that he had, to give the BLM a day's notice before he would go to his allotment and to be prepared to pay the damages. The Court has entered that injunction.

Senator CRAIG. Well, my time is almost up, so I am going to move on to our other colleagues. We are using 10 minutes so that we can move through those of you who have assembled. So let me first turn to Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

Mr. Myers, I think, as you know, of course, you are being considered for this position as a Federal judge, one whose job it is to interpret our Federal statutes and apply Federal laws, and you made some pretty significant statements about the role of the Federal Government with regard to protecting the environment, and they do trouble me.

You wrote, for example, that the Government's "endless promulgation of statutes and regulations harm the very environment it purports to protect."

You have also compared the Federal management of public lands to King George's tyrannical reign over the 13 Colonies, asserting

that public land safeguards the fueling of a modern-day revolution in the American West.

Which statutes and regulations were you referring to?

Mr. MYERS. Senator, those comments, that was approximately 1995, I believe.

Senator LEAHY. It was 1995.

Mr. MYERS. And at that time, I was representing Federal Lands' livestock interest and writing on their behalf. I was not referring to a specific statute or regulation. It was more of a tenor that a certain element of the industry believed was the case and that they were concerned on the assumption—and I think correct assumption that the vast majority are law-abiding citizens—that they were concerned that regulations intended to properly punish wrongdoers were having an adverse impact on their ability to lawfully ranch on Federal lands and, as a result, was making it more difficult for them to—

Senator LEAHY. Mr. Myers, that is not really answering the question.

I look at this statement, and having been born in part of the area that was originally part of one of the 13 Colonies, and we still think of history as being recent where I come from, I still want to know, I mean, there must be something in here if you are going to compare our Government, and its regulations, and its statutes to King George's reign over the 13 Colonies. I mean, you just cannot say, well, generally. You know, you would not accept that if you were in a court. You would not accept that from a lawyer.

This is a pretty explosive statement. Can you give me even one, even one statute or regulation you were referring to that equates the U.S. Government to King George's tyrannical reign over the 13 Colonies?

Mr. MYERS. Putting that article in the context of the time, that was the year that the regulations came out from the Department of Interior significantly changing the way that ranchers would operate on Federal lands, and it was in the context of that setting that ranchers were concerned about the impact of those particular regulations.

When I said or made the statement that there was concern about the tyranny of the regulations, it was not in reference to Government employees or—

Senator LEAHY. I am not suggesting that. I mean, we are talking about our Government.

Mr. MYERS. Right. It was—

Senator LEAHY. I love our Government. I respect our country, and to have our Government referred to as being like King George's time, it sort of strikes this Vermonter, well, with some apprehension. I am not suggesting you are nailing the loyal, hard-working employees and all. All I want to know is, I mean, tell us which statutes and regulations you believe are so harmful and unneeded that they make us like King George. I mean, words have meaning, Mr. Myers, and you are a very intelligent man, and when somebody goes and makes a statement that goes that far, I mean, you must have something that you are basing it on.

Mr. MYERS. Other phrases which were not of my authorship, but had been used in that time, were "Sage Brush Rebellion," "War on the West," and it was all—

Senator LEAHY. Mr. Myers, these are not the people who were up here for—I really wish you would answer my question. I do not care what other people said. What statutes and regulations were so harmful or unneeded?

Mr. MYERS. It was in the context of the regulations of Secretary Babbitt regarding rangeland reform. It was called "Rangeland Reform 1994," and this was 1995.

Senator LEAHY. So that was unneeded?

Mr. MYERS. No, Senator, my point was that the overall approach of the regulations was having an adverse impact on the vast majority of the people that I was representing, at least in their perception. That is what they told me, and that was the message that they asked me to carry forward.

Senator LEAHY. So this was not your thought. I mean, which is it?

Mr. MYERS. I was writing—

Senator LEAHY. So you are not prepared to identify any statutes or regulations that you felt were totally unneeded and may still be on the books.

Mr. MYERS. It was in the context of the rangeland reform regulations that I wrote that.

Senator LEAHY. So you felt those were unneeded, harmful. I am not trying to put words in your mouth. I am trying to figure out what you were meaning.

Mr. MYERS. I was advocating on behalf of my clients who believed that they were harmful to their business.

Senator LEAHY. Well, let's go to another point. How are we on time, Mr. Chairman?

Senator CRAIG. You have got about four left.

Senator LEAHY. Mr. Myers, you made a statement in a Hastings Law Review article about special interest groups working on environmental issues. Let me quote what you said. You said, "Like water searching for the path of least resistance, interest groups will seek the path of least governmental resistance. If the organizations are unable to fulfill their agenda through legislation and the executive branch, then they will focus their efforts on litigation that may provide a favorable judgment. The conventional wisdom of lobbyists holds that chances of obtaining a favorable judgment increase when judicial nominees are confirmed who are sympathetic, either through judicial philosophy or political philosophy, to the causes of that group."

Now, you spent most of your career as a lobbyist or activist in anti-environmental efforts. I mean, it seems to me you are writing about yourself in there.

Now, having said that, why should we feel that you are going to stand and be objective and not be the person you are advocating for who would be in sympathy with interest groups you have represented for so long?

Mr. MYERS. I believe it is the great strength of our judicial system that, while the conventional wisdom is that you look for a friendly judge, quite often that effort is disappointed because

judges who are on the bench do an excellent job of disregarding public appeal or personal opinion and apply the law to the facts.

So while I do think that that conventional wisdom holds within advocacy groups, it is my belief that it is often disappointed. And I can assure you that if I am so fortunate as to be confirmed, it will not play a role in my decisionmaking.

Senator LEAHY. Well, I will have other questions that I will submit for the record, but I have the same test, and I have used this for 29 years here with judicial nominees. And I have voted for and against nominees of both Republican and Democratic Presidents. I do not give an automatic pass even if it is a President of my own party.

I ask for a judge, if a litigant walks into that courtroom that—it doesn't make any difference whether that litigant looks at the judge and thinks, well, gee, I am the wrong political party, I have the wrong political philosophy, I am the plaintiff or I am the defendant, or I am rich or I am poor, black, white, whatever. I think they look at the judge and say I want to get a fair hearing. Win, lose, or draw, it is going to be a fair hearing. And to get my vote, you are going to have to convince me that everybody, both those who advocated for and those you advocated against—it is basically very clear who you advocated for. But a lot of people come to the courts from the side you advocated against, that they are going to get a fair hearing from you.

Thank you, Mr. Chairman.

Senator CRAIG. Thank you, Senator.

Now let me turn to Senator Ted Kennedy. Ted?

Senator KENNEDY. Thank you, Mr. Chairman.

Welcome, Mr. Myers. We are going to try and get over the fact that you work for Al Simpson.

Mr. MYERS. Thank you, Senator.

Senator KENNEDY. That is a big, big burden.

Actually, as you know, he has been a good friend and someone all of us have a good deal of admiration and respect for.

Senator CRAIG. Then we are trusting that all of you will take Al's advice in this matter?

Senator KENNEDY. We are always glad to listen.

[Laughter.]

Senator LEAHY. If he had nominated Al, it may be a different thing.

Senator KENNEDY. Thank you.

In 2001, as the Solicitor General of the Interior Department, you issued a formal opinion that undercut the Interior Department's ability to limit mining that harmed public lands, and that opinion paved the way for a foreign company to erect a 1,650-acre open-pit gold mine in the heart of a California desert conservation area in America's most culturally and ecologically sensitive areas. The previous administration had decided not to permit the mine, known as the Glamis Imperial Gold Mine, because as described by the Advisory Council on Historic Preservation, allowing the mine to be built would mean that the Quechan Tribe's ability to practice their sacred traditions as a living part of their community life and development would be lost.

As a result, under the previous administration, the Interior Department concluded that the mine would violate the Federal Land Policy Management Act, which prohibits mining that causes unnecessary or undue degradation of Federal lands. And under the FLPMA, the Interior Department has a duty to protect the public lands from mining that cause either unnecessary or undue degradation. However, your opinion as the Solicitor General concluded that the words "unnecessary or undue" actually meant their exact opposite, "unnecessary and undue."

And in the case of the Glamis Gold Mine, your interpretation meant that although the open-pit mine would have caused undue degradation of America's public lands, it was legal because it was necessary to the foreign mining interests.

A Federal court recently concluded that your opinion misconstrued the clear mandate of the FLPMA, which by its plain terms vests the Secretary of the Interior with the authority, indeed the obligation to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land. The court also held that you ignored well-established canons of statutory construction.

Those are the two observations, including the basic rules that Congressional language should be given its ordinary meaning and every word should be given effect whenever possible. The court concluded that in enacting the FLPMA, Congress' intent was clear. Interior is to prevent not only unnecessary degradation but also degradation that, while necessary to mining, is undue or excessive.

I am troubled by the implication of your view that under the FLPMA the Interior Department could prevent only mining that is both unnecessary and undue. Under your reading of the law, the Act wouldn't not prevent even the most environmentally devastating mining efforts unless those efforts were completely unnecessary to the mining operation.

Since we can expect that mining companies will act in their own self-interest and will not engage in unnecessary efforts, it is hard to see how your view of the law would prohibit any mining efforts at all.

So doesn't your interpretation of the FLPMA pull the rug out from under the requirements that the Interior Department protect the Federal lands?

Mr. MYERS. Thank you, Senator, for the question. Let me address that.

The decision that you refer to, a recent decision by Judge Kennedy in the district court, looked at a facial challenge to the regulations that were promulgated by the Department of the Interior in 2001 dealing with this kind of mining activity. The judge ruled in favor of the Department, finding that the regulations were valid because they would not allow undue or unnecessary impairment of the public lands. And the Department's regulations were promulgated in some part because of my opinion that preceded them. So the Department, my client, felt vindicated by the judge's decision.

With regard to the specifics of the issue, in my opinion, I did find some ambiguity in that key phrase. The first administration to define that phrase was the Carter administration in 1980 when it promulgated the regulations after the passage of FLPMA, or the

Federal Lands Policy Management Act, in 1976. That regulatory definition for unnecessary or undue impairment withstood the test of time for some two decades and never received a Federal court challenge.

In the year 2000, that Carter administration definition was changed with the addition of a standard known as the substantial irreparable harm standard. And in my opinion, that was the focus. Was the addition of the substantial irreparable harm standard in faithful compliance with the underlying statute? In my opinion it was not, and the Department of the Interior removed that standard and the court approved that decision.

Senator KENNEDY. Well, the court said, with regard to your opinion, "misconstrued the clear mandate, which by its plain terms"—that is about as tough a comment about a position, in terms of the court. And then, to continue, the court also held that you ignored the well-establish canons of statutory construction.

You might have had your own kind of thinking that there has been some change. Those are two observations that are about as tough a criticism as one could have.

Let me continue. I am troubled by the implications of your view the Interior could prevent only the mining that is both unnecessary and undue. Under your reading of the law, the FLPMA wouldn't prevent even the most environmentally devastating mining efforts unless those efforts were completely unnecessary to mining operations. Since we can expect that mining companies will act in their own self-interest, will not engage in unnecessary efforts, it is hard to see how your views of the law would prohibit any mining efforts.

I would like to ask you about another aspect of the involvement of the Glamis Mine matter. As you know, the Quechan Tribe was directly affected by the Interior's decision to permit the mining interests from outside this country to create an open-pit mine near cities that were crucial to the tribe's religious and cultural life. Your opinion in the Glamis matter is disturbing not only because it misinterpreted the Federal law, but also because you and the Secretary made a decision in this matter without any government-to-government consultation with the members of the Native American tribe, whose religious liberty and cultural heritage was at stake. Yet the Department of Interior met with the representatives of the foreign mining company, seeking to build a gold mine in the California desert conservation area.

Because of your position in the Glamis Mine matter and other matters affecting Native Americans, the National Congress of American Indians, which to my knowledge has not taken a position on any other of President Bush's judicial nominees, has written to this Committee opposing your nomination. And could that letter be a part of the record, Mr. Chairman?

Senator CRAIG. Without objection.

Senator KENNEDY. So why did the Interior decide not to consult with the tribe before making a decision that so clearly affected the tribe's religious freedom and culture?

Mr. MYERS. The Department of the Interior, through the Bureau of Land Management, which was the agency with the primary authority over this mine site, consulted with the tribe about their concerns.

Senator KENNEDY. But did you ever talk with them at all?

Mr. MYERS. No, I did not, Senator. I proceeded to look at this issue when I first arrived at the Department. When I got there, the regulation that was underlying this decisionmaking had been suspended by the Department. In addition, there were four Federal pieces of litigation pending. So when I got into the Department, I was handed a notebook with a number of hot issues, and one of those was this particular mine site because of the litigation and the suspension of the regulations.

So I turned to it immediately to determine on a fairly narrow point of law whether there was a problem with the underlying legal decisionmaking.

Senator KENNEDY. Well, the Department met with the mining company, but you did not feel that it was necessary to meet with the tribe.

Mr. MYERS. It wasn't, Senator, that I felt it was unnecessary—

Senator KENNEDY. Well, did you ever make a recommendation that you should meet with the tribe?

Mr. MYERS. That I should meet with them?

Senator KENNEDY. Yes, or you or someone else, did you ever make that recommendation?

Mr. MYERS. Well, I was informed that the Bureau of Land Management was consulting with them, and I thought that was appropriate.

Senator KENNEDY. Did you know whether they had talked to, met with them on this case?

Mr. MYERS. Yes, I was told—

Senator KENNEDY. But you did not feel as the person that was involved—did you ever meet with the other side?

Mr. MYERS. I did, but not upon invitation. My door was open, and they called for a meeting.

Senator KENNEDY. Well, your door is open. I am asking, it is open to one side and not open to the other? Did you ever feel—

Mr. MYERS. No.

Senator KENNEDY. —that when one side came in, the other side ought to be invited in?

Mr. MYERS. It was, Senator, open to both sides and—

Senator KENNEDY. But one—just so I have it straight. It was open.

Mr. MYERS. Yes, sir.

Senator KENNEDY. But one side came in, and then when you saw the one side, did it ever occur to you that you probably ought to see the other side, too? Or are you going to leave it up to the Indians?

Mr. MYERS. It didn't really, Senator, because I had already started my opinion, and—

Senator KENNEDY. You started your opinion?

Mr. MYERS. I had started it prior—

Senator KENNEDY. When? After you talked to the gold mine?

Mr. MYERS. No, sir. Before.

Senator KENNEDY. Before. Before you even gave consideration to seeing—well, you know, even if your job is to interpret the law, the legal standard has to be assessed in light of the facts. And I think

it would have been helpful to learn the facts, the view, the tribe's view of the facts.

Is my time up?

Senator CRAIG. Your time is up.

Senator KENNEDY. I have other questions, if I could.

Senator CRAIG. Surely.

Senator KENNEDY. Thank you, Mr. Chairman.

Senator CRAIG. We will do another round.

I am going to take my colleagues in order of their arrival. Let me turn to Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman.

Mr. Myers, thank you for joining us. You may be aware from press accounts that we are in the midst of an investigation of this Committee and computer theft of documents from Democratic Senators and their staff. And the question I am about to ask you does not relate to you in any personal way, but it is going to be a standard question which I will ask of all the candidates who come before this Committee.

In preparation for your testimony today before the Judiciary Committee of the Senate, did you meet with any staffers on the Senate Judiciary Committee staff?

Mr. MYERS. Yes, sir.

Senator DURBIN. And did you also meet with any representatives of the Department of Justice?

Mr. MYERS. Yes, I did.

Senator DURBIN. And any other Federal agencies, the White House or any other agencies in preparation for today's testimony?

Mr. MYERS. Yes.

Senator DURBIN. And could you tell me if during the course of preparing for this testimony you were given any documents or information which would lead you to believe that they were from Democratic Senate staff members or Democratic Senators?

Mr. MYERS. Not at all.

Senator DURBIN. I thank you for that very much. We do not know the nature and extent of this theft and burglary of the computer documents. I know my office was one of the offices that was targeted for the theft of these documents. And once we have established that, I will just say for the record, Mr. Chairman, I am going to ask this Committee to ask of all of the nominees who have come before us during that period of time basically the same questions I have asked of you. But I am very happy that you have responded as you have today.

Let me ask you just a few questions relative to your background and the position which you are seeking. Do you feel that you are in the mainstream of thinking when it comes to environmental protection?

Mr. MYERS. Yes, Senator. The only reason I pause is because my statements and my writings have been on behalf of clients, whether that's in public service or in the private sector. And I would submit to you that those individuals are in the mainstream, by and large. Some may not be.

Senator DURBIN. I know that the role of an attorney is an advocate. I want to ask you: Is there anything that you have written on behalf of your clients that you do not personally believe?

Mr. MYERS. I have advocated in some cases where I told the clients I frankly did not think it was a winnable case, that I thought my reading of the law and the precedents suggested that it was going to be difficult. Certainly there was a colorable argument and a fair argument to be made on their behalf, but I gave them advice that it would likely be difficult to win going in, and yet I carried their argument forward.

Senator DURBIN. But you have taken that to a different level. What you have said to me is you have said to a client someone else, some court, may not agree with what I am about to write here.

Mr. MYERS. Right.

Senator DURBIN. I want to ask you personally, the things that you have written, the legal statements that you have made on behalf of your clients, did you believe them?

Mr. MYERS. To the extent that as an attorney I believed it was important to believe in my clients, and my standard, Senator, essentially, in a nutshell, if you will, is that the client deserves the representation as long as they are not asking me to do something that's unethical, immoral, or illegal. And if they pass that bar, then I am willing to absorb their cause as my own because I believe it makes me a better advocate.

Senator DURBIN. Well, let me then get into some specific things that you have written, and you can tell us now whether you agree with them or believe them today or whether they were merely what you considered to be a lawyer's responsibility when you did these things.

You have said some things relative to the Commerce Clause, and, of course, that is an important issue for us because for 70 years that has been settled law, that the Commerce Clause was basically the hook by which the Federal Government had authority to extend the rights, liberties, and even restrict some activity by entities, businesses, and individuals. And yet what I find I your writings, for instance, in a case in my own home State, *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, you argued that Federal regulation of land use is beyond Congress' Commerce Clause power because that area is traditionally regulated by State and local governments.

Since the Commerce Clause, Mr. Myers, is the authority upon which many of our most essential health, safety, environmental, and anti-discrimination laws are based, I would like to ask you: Are you arguing with that school of—or are you supporting that school of thought which rejects the use of the Commerce Clause to give the Federal Government its power over issues involving health, safety, environment, and discrimination?

Mr. MYERS. Clearly, the Commerce Clause has an important role to play, and the Congress' interpretation of that clause in exercise of its duties to pass legislation is key. There are many examples on our statutory code books of the proper exercise of that for environmental, for health, safety, and welfare type of standards.

In the argument that I was making in the SWANCC case, there was a question that the clients had about the applicability of the Commerce Clause to this particular municipal land waste site in this abandoned strip mine and whether that was a correct exten-

sion. So I made that argument on their behalf, along with the Clean Water Act arguments.

Senator DURBIN. Did you believe it? Is that your point of view? Is that the view you will take to the bench if you are, in fact, confirmed?

Mr. MYERS. Well, the Supreme Court didn't reach that issue in its decision. It stuck with the Clean Water Act—

Senator DURBIN. No, no. I want to know what is in your mind. I want to know what you believe. Is that what you believe and is that the philosophy you will take to this lifetime appointment?

Mr. MYERS. I think the best answer to that, Senator, is that I would like to follow the Supreme Court's decisions on that. If I, frankly, were to sit here and opine on a personal belief on this or that, then litigants who might come before the Ninth Circuit on which I would sit, if I am so fortunate to be confirmed, would be combing through this transcript to discern my personal views. And I, frankly, would not want litigants to think they needed to even go there, that they should believe that I would follow the precedents of the Ninth Circuit and of the Supreme Court.

Senator DURBIN. Mr. Myers, that is what all nominees say. All we can go on is what you have done and what you have written and what we apparently can conclude that you believe.

Let me go to a second issue, the issue of property rights, which has been central to your life as a lobbyist and your life as a member of the Bush administration and the Department of Interior.

The case is *Sweet Home Chapter of Communities for a Great Oregon* v. *Babbitt*, and you argued that the constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure. That statement, Mr. Myers, runs in direct conflict with Supreme Court precedent, which says that there are certain rights, certain fundamental rights which are really elevated when it comes to our Government. And they have identified the right of free speech and the right of freedom from unreasonable search and seizure.

Are you arguing and do you believe that the right to private property is at the same level, as you say here, "is as fundamental as the right to free speech"? Do you believe that when it comes to assessing the Government's activity relative to property rights, that it should be subject to the strict scrutiny test which is reserved for the most precious and guarded rights in our Constitution?

Mr. MYERS. I think probably the best answer to your question, Senator, is to refer to the brief from which you are citing, and in that passage to which you refer—I did not write the brief, but it was a reference to the Supreme Court's decision in 1994 in the property case of *Dolan* v. *City of Tigard*. And in that decision of the Supreme Court, the Supreme Court said that the Fifth Amendment, which contains, as you know, the Takings Clause, is as much a part of the Bill of Rights as any other amendments in the Bill of Rights and that it should not be, to use the Court's words, "relegated to the status of a poor relation." And using that precedent from the Supreme Court, that was the point that we were trying to make in that—

Senator DURBIN. So you don't back off? This is what you believe? When it comes to strict scrutiny and the most guarded rights under the Constitution, the right to property is equal to freedom of speech, freedom of religion, freedom from unreasonable search and seizure? That is your belief?

Mr. MYERS. My use of the analysis of strict scrutiny would be, I think, primarily in the context of equal protection and due process. But I would stand on the Supreme Court's decision in *Dolan* v. *City of Tigard* as a statement of the Supreme Court, which is binding upon the Ninth Circuit.

Senator DURBIN. All right. Let me move to another area. In the Sweet Home case, you also—excuse me, I have that—yes, I believe it was in that same case. You praised what you called the Supreme Court's "retreat from the protection of privacy." Do you believe that though it is not enunciated in the Constitution that we have a fundamental right to privacy as citizens in this country?

Mr. MYERS. Well, the Supreme Court has been crystal clear on that, and the answer is yes.

Senator DURBIN. Why would you then celebrate what you called the Supreme Court's "retreat from the protection of privacy"?

Mr. MYERS. Frankly, Senator, I'm not sure of the context of that quote, but it may have been a reference to the decision of the Supreme Court that was recent to the time of that writing in the case of *Bowers* v. *Hardwick*, which was universally seen as a retreat from some of the Supreme Court's previous precedents on privacy. My statement was merely a reflection of general knowledge to that extent. It was not a unique thought to me.

Senator DURBIN. May I ask you, when it comes to your legal experience, you have indicated that you have had no criminal litigation experience. How many civil cases have you taken to verdict, either with or without a jury?

Mr. MYERS. I would guess a dozen.

Senator DURBIN. A dozen cases to verdict?

Mr. MYERS. Yes.

Senator DURBIN. All right.

Senator CRAIG. Senator, your time has expired.

Senator DURBIN. Thank you very much.

Senator CRAIG. Let me turn to my colleague, Senator Feingold. Russ?

Senator FEINGOLD. Thank you very much, Mr. Chairman.

Congratulations, Mr. Myers. Welcome to your family.

Mr. MYERS. Thank you.

Senator FEINGOLD. Environmental issues are of greater concern to me and the people of the State of Wisconsin and, of course, many important environmental issues come up before the Ninth Circuit. So I would like to focus my questions on those types of issues.

I would like to first follow on a matter that Senator Durbin just brought up. You authored a Supreme Court amicus brief on behalf of the National Cattlemen's Beef Association and others in the so-called SWANCC case. That case involved a challenge to the Federal Government's authority to prevent waste disposal facilities from harming waters and wetlands that serve as vital habitats for migratory birds, and as was indicated, you argued in your brief that the Commerce Clause does not grant the Federal Government au-

thority to prevent the destruction and pollution of isolated interstate waters and wetlands.

For 30 years, the Clean Water Act has protected our Nation's waterways, including lakes, ponds, and streams, and so I also am interested in your views on the Commerce Clause and the Clean Water Act in general.

Let me follow up on what Senator Durbin asked you in a little different way. Is it your view that the Commerce Clause is the only possible constitutional authority for passing the Clean Water Act? Might one also find Congressional authority over protection of wetlands in not just the Commerce Clause but the Property Clause, the Treaty Clause, or the Necessary and Proper Clause?

Mr. MYERS. Well, I would hesitate at this moment to speculate on other bases for the Clean Water Act. Clearly, it is constitutional. Whether a particular clause is the basis for that or not, I refrain from speculating on simply because that may be the basis of an argument that might come before me.

It might be helpful, Senator, for me to put in context for you the brief that I did file.

I was representing, as you said, landowners, large landowners in the form of cattle ranchers, who were concerned that the Corps of Engineers' interpretation of the Clean Water Act might impinge upon a Congressional exemption that those farmers and ranchers enjoyed. Under the Clean Water Act Section 404(f), there is an exemption for ordinary farming and ranching activities. And the concern was that if the Corps of Engineers were to require a permit for an alteration of a stock pond, that that would have a fairly dramatic impact on that statutory exemption. And that's why I filed that brief on their behalf.

Senator FEINGOLD. So you would not exclude the possibility of those other provisions in the Constitution being a basis for the constitutionality of the Clean Water Act?

Mr. MYERS. Well, I can fairly say I wouldn't exclude them, yes.

Senator FEINGOLD. Is it your view that Congress exceeded its constitutional authority in passing the Clean Water Act?

Mr. MYERS. No.

Senator FEINGOLD. The Department of Justice on behalf of the Army Corps and EPA has filed approximately two dozen briefs in Federal court since this SWANCC decision. In these briefs, the DOJ has consistently argued that the Clean Water Act does not limit coverage of the Clean Water Act to navigable in fact waters. For example, in one brief, DOJ argued, "SWANCC does not limit the coverage of the CWA to navigable in fact waters and wetlands adjacent thereto." The brief continues: "To exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would disserve the recognized policies underlying the Act since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters." That is the end of the quote.

Do you agree with the administration's consistent interpretation of the SWANCC case?

Mr. MYERS. Well, let me speak to my interpretation because I don't know which cases those are that you might be referring to,

and I don't want to speculate when I don't have that level of familiarity.

Senator FEINGOLD. One would be the brief in *United States* v. *Rapanos* in the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. MYERS. Okay. The Supreme Court ruled in favor of the solid waste agencies, and I suppose you could say by reference to my amicus party, since we were on the side of the petitioners, and determined that the Clean Water Act did not extend to isolated, intrastate, non-navigable wetlands.

Senator FEINGOLD. You disagree with the administration's approach?

Mr. MYERS. If their approach is consistent with my understanding as just announced, I would not disagree with it. That's my understanding of the ruling in SWANCC.

Senator FEINGOLD. Senator Durbin asked you—let me just ask you directly again. How do you read the Supreme Court's SWANCC decision? What waters, if any, do you believe should not receive Federal Clean Water Act protection post-SWANCC?

Mr. MYERS. Well, I don't want to sound flippant, but obviously the particular abandoned mine site that was the subject of the litigation we could safely state is exempt. Then the question is what other types of water bodies might be like that abandoned mine sit that would be used for landfill. And the core principles that I understood from the decision—and, frankly, I haven't reread it in many years, but it was that if you have an isolated, intrastate, non-navigable wetland, that is not subject to Clean Water Act jurisdiction.

Senator FEINGOLD. Now, let me ask you about another—

Mr. MYERS. For purposes, Senator, of a 404 permit.

Senator FEINGOLD. In the *Headwaters Inc.* case, the Ninth Circuit has ruled that the SWANCC decision should be read narrowly and that wetlands, streams, and other small waters remain protected by the statute, and implicitly that the rules protecting those waters are constitutional.

Would you follow the circuit's precedent if confirmed, or would you try to change it?

Mr. MYERS. I would follow it, Senator.

Senator FEINGOLD. Let me ask you about a different matter then. This year marks the 40th anniversary of the Wilderness Act, and I had the pleasure of being involved in creating a Senate Wilderness Caucus, and wilderness issues are very important to me and my constituents in Wisconsin.

During your time at the Interior Department were you involved in discussions regarding possible changes of the interpretation of FLPMA, wilderness inventory power and the ability to designate wilderness study areas to the planning process prior to 2003?

Mr. MYERS. The matter that I think you're referring to, Senator, was the settlement of a piece of Federal litigation in the District Court in Utah brought by the State of Utah and others against the Federal Government, and the settlement that was reached was essentially to suggest that the authority of FLPMA, the Federal Lands Policy Management Act, was very clear on the ability to establish wilderness areas under Section 603 of that Act.

Senator FEINGOLD. Right. But were you involved in discussions regarding possible changes to the interpretation?

Mr. MYERS. Yes, I was.

Senator FEINGOLD. And what were the nature of those discussions and what was your role?

Mr. MYERS. Well, the discussions were should we settle this case, and if so, what would be the parameters of that settlement? So I was a participant in that to discuss whether under the Wilderness Act and under FLPMA the settlement was appropriate. It was filed and the District Court accepted it.

Senator FEINGOLD. As Solicitor General for the Interior Department, as you indicated, you approved the filing of a settlement with the State of Utah last April that will remove the possibility of administrative protection for millions of acres of potential wilderness on BLM lands outside of Alaska. This approval came despite the fact that every Interior Secretary in the previous 26 years, including James Watt, affirmed and used BLM's authority to administratively protect lands as wilderness study areas. Would you please explain how you reached the decision to undertake this dramatic policy reversal in litigation?

Mr. MYERS. I think I need to clarify, Senator, that the settlement that was reached in the negotiations between the State and the Department of Justice continued to protect designated wilderness and designated wilderness study areas under FLPMA Section 603.

Senator FEINGOLD. Did you conclude that you would not have prevailed on the question of the ability of BLM to carry out wilderness inventories in the *State of Utah* v. *Norton*?

Mr. MYERS. We decided that under the authority that Congress had clearly set out under Section 603, that the inventorying for wilderness and the designation of wilderness was, under the Act, subject to a 15-year expiration date, which seemed fairly clear from the reading of the Act, and that was the context from within which the settlement was reached.

Senator FEINGOLD. Did you arrive at the conclusion, when the Tenth Circuit had already held that the State of Utah—excuse me one second. How did you arrive at the conclusion, when the Tenth Circuit had already held that the State of Utah did not have standing to challenge BLM's wilderness inventory authority and therefore Utah could not have possibly much less prevailed on that issue?

Mr. MYERS. There were two separate authorities in the context of the litigation for wilderness study area designation. Clearly under Section 603 under the mandate of FLPMA, the administration was given 15 years in which to designate proposed wilderness and to forward that by the Secretary of the Interior, Former Secretary Andrews, to the President, and from the President to Congress for designation. And that included wilderness study areas as well as proposals for specific wilderness.

Those proposals went forward and those wilderness areas and wilderness study areas exist today. The disconnect was whether there were other provisions outside of Section 603 that provided that authority, and I didn't think there was.

Senator FEINGOLD. Well, I want to pursue this some more, and this will be important to me as we go forward. I am concerned that

this has the appearance of a case of utilizing closed door negotiation of a settlement to make a controversial policy reversal without public input and with no accountability to Congress. As I understand it, this has a binding effect on the future. But in fairness to you, I will follow up on the arguments you have made with regard to the ability to do something with regard to wilderness for 26 years. I think this has very serious implication. But I do thank you and I will pursue this with you further.

Thank you, Mr. Chairman.

Mr. MYERS. Thank you, Senator.

Senator CRAIG. Your timing is excellent. Thank you.

Let me at least opine for the record that my colleagues who have asked questions today are from states where limited if hardly any Federal land exists. For those of us from the West who work with our Federal public policy on occasion, if not all the time, sometimes we find it in conflict, sometimes we find it balanced, but I would guess that most westerners are oftentimes frustrated by the authority the Federal Government holds over them both in individual and collective acts. I say that not to you, Mr. Myers, but for the record, as a westerner who grew up in a public lands State, often frustrated by the Federal Government, and probably one of the driving motives that made me a U.S. Senator.

But as a Senator, both myself and my colleagues make public statements, and every 6 years we are held accountable for those. You have obviously made public utterances or at least made statements for a public record. I understand in 1988 you were writing about the nominee, Judge Bork, at the time, and you opined that whether some of the opinions herein may 1 day come back to haunt you. I suspect you have not been "Borked" and neither have any of us, but I think oftentimes, as we move ahead with our careers and our lives, that those of us who make public statements find a need to adjust, modify, or openly stand by that which we make.

Let me go back to a couple of items that have been brought up by our colleagues as it relates to mining and grazing, very important issues for public land management, very important issues for States and private interests, depending on your point of view and the law itself.

You have been criticized for your involvement in permitting the process for a proposed gold mine in Southern California. My colleague from Massachusetts mentioned it, the Klamath Gold Mine. But in fact, you were not involved, I understand, in the permitting process at all, but rather you simply issues a solicitor opinion regarding the proper scope of the Interior Department's authority under the Federal Land Policy Management Act, that we call FLPMA, which allowed Klamath Gold, the owner of several claims in the area, to proceed with a pre-existing mining proposal. Is that not correct?

Mr. MYERS. That's correct, Senator.

Senator CRAIG. So on what basis if any could someone assert that you handled this Klamath Gold Mine claim?

Mr. MYERS. Well, I certainly had no involvement in consideration of the proposed plan of operation. That is the authority and expertise of the Bureau of Land Management. As you suggested, my role in that matter was looking at a fairly narrow point and deter-

mining whether the Department had the Congressional authority that it needed to make certain interpretations.

Senator CRAIG. I am going to pursue this line of questioning, but my colleague from California has just arrived, and of course this particular decision and action took place in her State.

Senator Feinstein, we are talking about the Klamath Gold Mine Claim and that decision. Let me proceed.

Had not the Babbitt Interior Department approved this same proposal supported by two draft environmental impact statements in 1996 and 1997, and two separate Native American Tribal Cultural Resource studies in 1991 and 1995? Up until the last week of the Clinton administration, was that not the position?

Mr. MYERS. Yes, Senator, that is correct.

Senator CRAIG. Then I understand that Former Secretary Babbitt's denial of Klamath's mining claim was based on a 1999 solicitor opinion which in turn was based upon a novel interpretation of Federal law. Your opinion rescinded that interpretation. Did you draft your opinion based on Klamath lobbyists, had exclusive insider access to the Department of the Interior? How did you arrive at your opinion in that case?

Mr. MYERS. Well, as I mentioned earlier, when I arrived at the Department this issue was alive and well. The department had already put on hold the regulations that were the basis for the decision, and they were in suspension mode basically, and I had four, by some counts, five pieces of Federal litigation pending. So it was an issue that I needed to turn to, and I relied on my colleagues in the Solicitor's Office to give me the history of the mine site, the history of Solicitor Leshy's opinion, and we coordinated obviously to discuss whether or not that was a fair reading of FLPMA.

Senator CRAIG. In fact, as I followed that case and saw your decision, I felt you had little choice but to rescind the prior opinion because it simply could not be defended in the courts. Is that correct?

Mr. MYERS. My concern specifically was with the key phrase that was the basis for the previous decision, and it's known as "undue impairment" and that is within the Federal Land Policy and Management Act. That portion of the Act deals with the California Desert Conservation Area and is rather specific. The Act, as passed in 1976, gave Congress—excuse me—gave authority to the Secretary to promulgate regulations if he or she so chose, and that if those regulations were promulgated, they should consider undue impairment of the area. No Secretary, since the passage of the Act in 1976, had taken the opportunity that Congress had provided to promulgate the regulations. It was simply my thinking that before the Department should try to apply the standard, that it should take the initial step of promulgating regulations under the Administrative Procedures Act with notice and comment to the public, so that that process would be followed according to the statutory mandate.

Senator CRAIG. Thank you.

For the balance of my time let me turn to the issue of grazing, one of the legal and appropriate utilizations of public land resource in the opinion of many westerners and I would hope most Americans. It was referenced earlier by one of my colleagues that to compare the Federal Government's management of public lands to

King George's tyrannical rule over American colonies and claim that public land safeguards are fueling a modern-day revolution in the American West.

Since I have served on this Committee, Mr. Myers, I have become familiar with but not more tolerant of the practice of hard left groups deliberately taking nominees' quotations out of context and/or misrepresenting what the nominees said or wrote, then trying to smear the nominees' basis on their misrepresentation. It is even less proper for Senators I think to give credence to those who play that game. Here is one against Mr. Myers that does not stand up to even 5 minutes worth of research. So what I am going to do now is read the quote. "So wrote our Founding Fathers in the Declaration of Independence"—I believe this is these words—"describing the tyrannical actions of King George in levying taxes and turning even the simplest enterprise into exercises in bureaucratic and regulatory entanglement. A modern-day revolution has been brewing in America's West, and it is founded on a similar set of grievances. In the late 1970's and early 1980's it was called the Sagebrush Rebellion. For the past several years it has been known as the War on the West. This has become a rallying cry amongst many westerners who object to the Government over-regulation and efforts to limit their access to Federal range lands, revoke their property rights and generally eliminate their ability to make a living on the land."

I believe that is the fullness of the context. And I think that what I sense you are reacting to—and you can certainly put it in your own words—but what I have reacted to when using phrases like "the War on the West" or the "Sagebrush Rebellion"—and when I was elected to Congress in the early 1980's it was brewing might loudly—was an attitude or a frustration that there is reasonable regulation and appropriate regulation, and then there is excessive regulation that denies or limits so dramatically the ability of certain legal and historic uses of our public lands. I will stop there. I will not put words in your mouth. I will turn to you for any response to those comments.

Mr. MYERS. Well, let me pick up where you left off, Senator. Certainly there are appropriate regulations for use of Federal lands, and specific to grazing. In fact, the Taylor Grazing Act of 1934 was passed in large measure because ranching interests wanted to regulate the use of the western lands against cattle barons who were coming out from the railheads and unloading livestock by the cattle car and running rampant over all of the lands that these ranchers had already established. So I think there is a clear history of the importance of environmental regulations on ranching.

I would like to point out as well, within the context of the article that you just mentioned, that my statement at the beginning about the War on the West and the Sagebrush Rebellion was to put in historical context where we found ourselves. The theme or thesis of the article was that it would be much better if the Federal Government would work with environmental stewards to enhance the environment, and in fact, other quotes from that article are specific, where I say that environmental stewardship is both good business and good citizenship.

Senator CRAIG. Most westerners would agree with that statement.

A little time left, but we have had new colleagues—I should not say new colleagues—but colleagues join us, and let me turn to them in the order in which they have come for their first round if they choose.

I believe, Senator Schumer, you arrived ahead of Senator Feinstein, so we will start with you.

Senator SCHUMER. Thank you, Mr. Chairman. First let me say I am glad to be back in this room. I want to thank my House colleagues for their courtesy. As many know, I served for 16 years on this Committee. I was in this seat for several years till seniority moved up. I think I may have been—no, I think I was a little further over.

Senator CRAIG. Chuck, before you arrived this morning, I am told by our staffs that we are making history here, that nomination hearings have never been held here by the Senate. So you are possibly making double history today.

Senator SCHUMER. Well, I did make history when I sat here because I was the only person to serve on the impeachment proceedings in both the House and the Senate. From my point of view, it had a happier outcome in the Senate than in the House, but I am still glad to be here.

I might note that having served under a bunch of these Chairs, Henry Hyde and Peter Rodino and Jack Brooks, and not Manny Seller, but he held the seat I held in the House and was Chairman of Judiciary for decades. So I am glad to be here.

Second, I just wanted to note, as others have, we are at a little bit of a disadvantage today because of the ricin attack. Our staff's access to all of our computers, which I presume are now secure—

Senator CRAIG. Made secure by the Chairman of the full Committee, Senator Hatch, correct.

Senator SCHUMER. We thank him for that, very much so, but we are at a little bit of a disadvantage. Whether we need—we may, Mr. Chairman, I would just like the record to show, may need another hearing to flesh out the record here if we find—and I hope the Chairman—he has always been good this way—would understand that.

Senator CRAIG. The record will remain open and you can certainly submit questions and the nominees will respond appropriately.

Senator SCHUMER. Maybe they can have the record remain open for a little extra period of time, because we are not getting back to our office in the Hart Building until tomorrow, and the Dirksen Building, where my Judiciary staffers are, is not going to open I think till Monday.

Mr. Myers, first I want to welcome you and thank you for being here.

Mr. MYERS. Thank you, Senator.

Senator SCHUMER. You and I disagree on a whole lot of things, and I am going to ask some pretty sharp questions, but that does not mean that I do not hold you personally in high regard, and I do not want particularly your children—I have two daughters. Are those your two daughters?

Mr. MYERS. They are.

Senator SCHUMER. So I have two daughters a little older than yours, and I know if they were sitting here they would be a little puzzled why people are asking such tough questions of their nice Dad.

Senator CRAIG. So, Dad, behave yourself, okay?

Senator SCHUMER. Yes, exactly. So I just wanted to tell them, your dad is a good man, and he is seeking public service and we admire that.

Now, as you probably know, Mr. Myers, I have three standards when I choose and vote on judges. They are excellence, they should be legally excellent, not somebody's brother-in-law or some political hack. A Federal Judge, particularly a Court of Appeals Judge has enormous power. The second standard is moderation. I do not like Judges too far right or too far left. Judges who are idealogues tend to want to make law, not interpret the law. And the third is diversity. I do not think the bench should just be white males. That third category has to be taken as you look at a whole school of nominees, so it is not really relevant.

And I do not have much doubt on your excellence provision part of you, but I do have doubts on the moderation part, and that is where I will ask my questions.

You have had a long and distinguished record of passionate advocacy for private mining and ranchers' interests, and I respect that, respect the work you have done in the private sector, and respect the fact that when it comes to environmental policies you clearly have had deeply-held beliefs which you have worked hard to make the law of the land, and those deeply-held beliefs are represented in part by some of the comments you have made regarding environmental protection laws and those who support them.

Now, I know my good friend from Idaho has said, "Well, these quotes should not matter." I think they matter very much. We do not know of Mr. Myers' record as a judge or as a law professor because I guess you have never served as either of those. So it is not only the cases he litigates, because we have had lots of people come before us and say, "I didn't agree with the case I litigated, but I was being a good lawyer." So the comments that people make are all we have and I think they are extremely relevant and I think I would be not doing my obligation to the 19 million people of New York, or for that matter the 280 million people of America if I did not ask about them, because they do come off as hardly moderate. Here are some of them.

In one article—this was not rhetoric in the courtroom, it was an article—you said, "Environmentalists are mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety and welfare." I do not think most people in this country would think environmentalists are trying to stop health and safety. You may think they go too far in promoting health and safety, but to say they are stopping it, wow. The cases you were discussing include suits to halt the racially discriminatory placement of waste treatment facilities, to protect irrigation canals from toxic chemicals, and to halt logging in protected national forests.

Some of my democratic colleagues will tell you that much to their chagrin, I agree that there are abuses in our litigation system, and that frequently Americans resort to courts all too quickly when no one is at fault, there is no appropriate remedy or the matter could better be handled legislatively or extrajudicially. That said, the cases you were discussing hardly seem to be the examples of wild-eyed litigation run amuck, and your comment is hardly reflective of the moderation and temperament we look for from judicial nominees. It is not just one quote we are plucking out of here. There is a whole long series. Let me read you a few others.

You compared the Government's management of public lands to King George's tyrannical rule over the American colonies. I have heard that before I came in Senator Leahy asked you a little about that one. But here are some others that I am going to ask you to respond to. You wrote that the Federal Government's "endless promulgation of statutes and regulations harms the very environment it purports to protect."

And specifically regarding the Endangered Species Act and the Clean Water Act, you said that they have "the unintended consequences of actually harming the environment." I do not think most people think that of the Endangered Species Act and particularly the Clean Water Act.

You claimed that it's "fallacious to believe that centralized government can promote environmentalism." Well, that seems to be a view that was more appropriate 100 years ago, and discounts all the advances and changes and progress that we have made in this country. There is a broad consensus in America, Democrats, Republicans, liberals, conservatives, economists, that there are externalities, that if I run a power plant, it may be in my business's interest to send noxious fumes and smog into the air, and it may not even hurt my State. We have this problem in the Northeast. Because the winds blow the stuff over, away from my State and into the Adirondack Mountains. The only resort is the central government, and you seem to just dismiss it.

So I want to ask you about those quotes. I will get back to them.

You argued that the Federal public land safeguards are fueling, "a modern-day revolution in the American West," that our environmental regulations are "designed to turn the West into little more than a theme park."

Well, you may not agree, but there are tens of thousands, millions of citizens who want to enjoy the environment as is. And to say that our forests or our lakes or our rivers or our deserts are a theme park?

You called the Migratory Bird Rule, "an unwarranted and despotic intrusion by the Federal Government over every brook, creek, cattle tank, mud puddle, slough damp spot in every owner's backyard." How do you say that? Slew. I am from Brooklyn. I do not know too many sloughs.

You called the California Desert Protection Act, one of Senator Feinstein's most—we all respected her for the job she did getting it passed. I am not going to ask you about it. I imagine she will, but you called it an example of legislative hubris. And the list goes on and on, not one quote, not two, but it seems these are your deeply-held beliefs. I respect those beliefs. I even respect the right

to go to court and litigate those beliefs, or for you to defend those who are litigated against.

The question is, when you become a judge on the Ninth Circuit, when you have had such deeply-held beliefs, how can we be assured that you will simply impose the law? That when a company is violating the Clean Air or Clean Water Act, that you will not think that these are harsh despotic regulations and try to undo them, because they are the law of the land supported by Democrats and Republicans alike?

My fear, to be honest with you, sir, is that when it comes to environmental protection we will be putting the fox in charge of the hen house, that you will do your mightiest from the bench not to interpret the law, but to write it in a way that you like because you feel so passionately that the law has gone amuck. So you do not strike me as a moderate. You strike me, at least on environmental issues, as someone quite extreme, that if you had to put all Americans and rate them from 100 who are the most liberal to 1 being the most conservative, you would not even be a 10, you would be a 1 or a 2. The question is whether 1's or 2's or for that matter, 99's or 100's—because I feel I like moderate judges—should be on the bench. And—

Senator CRAIG. Senator, you have now taken 11 minutes of the 10-minute time.

Senator SCHUMER. I have more to say here, and I apologize.

Senator CRAIG. We will get back to you on the next round.

Senator SCHUMER. I would ask that my entire statement be read in the record, but let me just add—

Senator CRAIG. Without objection.

Senator SCHUMER. Let me just ask Mr. Myers to please put in whatever context he chooses, the quotes that I outlined, the three, that endless promulgation of statutes and regulations the very environment it purports to protect, that the Clean Air Act—Clean Water Act and the Endangered Species Act—but I am particularly interested in Clean Water—have the unintended consequences of harming the environment, and, "that it is fallacious to believe that centralized government can promote environmentalism."

Thank you, Mr. Chairman.

Senator CRAIG. Mr. Myers?

Mr. MYERS. Thank you, Senator. I will do my best to respond to my comments. I think my starting point is perhaps your starting point, and that is the question of moderation, which you defined as essentially a desire to confirm non-activist judges. I agree with that completely. I think one of the strengths that I bring to this table today is the fact that I have had an opportunity to work in the three branches of Government, not as a judge of course, but as a litigator, as a member of the Senate staff, and in three cabinet-level agencies at various times and in various positions.

In that context I've had an opportunity to see firsthand the importance of separation of powers. The reason I raise this is because it's important in the context of moderation. Every court, every judge, should respect the appropriate role of the Executive Branch, and the Legislative Branch and not try to do those jobs.

But as soon as I say that, I want to follow along with the statement that if the case or controversy before that judge raises con-

stitutional issues or statutory errors, then the judge has to follow the law, and if it takes the judge into the Executive Branch to say, "You, Department, violated the law," then that is appropriate. If it takes the judge to the Congress because Congress passed a statute which that court believed to be unconstitutional, that's appropriate.

But within that context is the separation of powers that is important, and that a judge should not don robes, and then at the bench attempt to legislate. That is the role of Congress, and I respect that.

In the context of the quotes that you raised, there is a theme there because when I made those statements, I was an advocate for the Federal lands livestock industry. That was who I was talking for. That industry is spread over some 270 million acres of primarily western land, a very diverse geographic range, obviously.

It is an industry which I think has a strong record of environmental protection and stewardship, for the simple, self-serving reason that the rancher who destroys his Federal grazing land is going to have no place to go next year with his livestock because he has just destroyed the very environment that he relies upon for his business.

So when the regulations came out in the mid-'90's to regulate that industry, in a fair attempt, I think, to get at a few bad actors, I believe that the unintended consequence was that while trying to get at the few bad actors, it was having a consequence on the 90 percent-plus good actors who were taking care of the land, and that if the result was to run those ranchers out of business, then it was having the effect of taking good stewards off the land and that that was not a good consequence.

That is basically the answer to all of the quotes you mentioned.

Senator SCHUMER. Let me ask about a few specifics with—oh, okay, I have been told that Senator Feinstein has another appointment. I am just going to ask, then, one.

Do you really believe it is fallacious to believe that centralized government can promote environmentalism?

Mr. MYERS. No, Senator. A centralized government—i.e. Congress—has an important role to play in environmental protection. And the Clean Water Act, the Clean Air Act—there are probably 70 environmental statutes that give evidence to that truth.

Senator SCHUMER. So what did you mean when you said that?

Mr. MYERS. I was talking about the regulations that were being applied to the ranchers, who I believed at the time were environmental stewards, and my concern about the impact of those regulations on good ranching operations.

Senator SCHUMER. Thank you, Mr. Chairman.

Senator CRAIG. Thank you, Chuck.

Now, let me turn to Senator Dianne Feinstein. She, like I, resides within the Ninth Circuit. She is a distinguished member of this Committee.

I turn the next ten minutes over to you, Senator.

Senator FEINSTEIN. Thank you very much, Senator.

Mr. Myers, my dilemma with you after reading some of your writings, which are to some extent bombastic and engage in substantial hyperbole, is to try to determine whether these are your

true feelings and whether they will infiltrate your performance as an appellate judge and the decisions you will make.

A former official has written me a letter and I would like to just read part of it, if I might. It is a former Interior Department official. "Myers has advocated a very narrow reading of the Commerce Clause that would take Congress out of the picture when it comes to protecting the environment. He doesn't think that the Federal Government has much of a role in addressing environmental issues at all. This is a radical agenda that is clearly at odds with prevailing law. Nonetheless, if Myers is confirmed on the Ninth Circuit, he would likely seek to undercut Congressional action on environmental and public lands management issues."

Would you respond to that, beyond what you just said to Senator Schumer about obviously the Congress having the right to legislate?

Mr. MYERS. Yes, Senator. Let me also respond, if I might, to your first comment about occasionally being bombastic. That is true. There are times when I have written things which, looking back on them in time, were probably a poor choice of words, but at the time seemed like the advocacy that I was being asked to advance.

Having said that, the concern that you are expressing as related to you by a former Interior official of some sort, I think, is, shall I say, not completely informed because he or she has not recognized in that writing that you have just quoted the efforts that I have made while in public service to take a balanced approach.

Prior to your arrival here today, I talked, for instance, about a case in California where the BLM had to take action against a rancher to prohibit that rancher from taking a bulldozer to a stream, installing a pipeline, destroying the riparian habitat and the fence that stood between him and the stream.

That case came to me as Solicitor. I quickly said, yes, we have got to get on top of this. The Department of the Interior, through the Department of Justice, filed a motion for preliminary injunction. The court thankfully granted that injunction and we stopped that rancher. That is, in my opinion, the kind of example that you need to consider as you are deliberating whether I would disregard statutory mandates or Congressional authority, and I am here to tell you that I would not.

Senator FEINSTEIN. See, that is my dilemma to figure that out because I could not vote for you to be judge based on the views you have expressed in your writings. I, in some, have found that people who have been advocates can put that aside and can be a fair judge, and in others I have drawn the conclusion that I don't believe they can.

You have a very mild manner. I expected to see a 300-pound, huge, muscled man after I read your writings.

Senator CRAIG. Now, Senator, you know me better than that.

Senator FEINSTEIN. No, you are not 300 pounds, and I won't comment on the muscles.

Senator CRAIG. No, no. I am talking about those whom I might be an advocate of in relation to the Ninth Circuit.

Senator FEINSTEIN. One thing that I have been very proud about—and Senator Schumer alluded to it—was the Desert Protection Act. It protected 7.7 million acres of pristine California wilder-

ness, 5.5 million as a national park preserve; provided habitat for over 760 wildlife species. It created the Joshua Tree National Park, the Death Valley National Park, the Mojave Preserve; provided recreation for 2.2 million people and more than $237 million in sales, $21 million in tax revenue, and thousands of new jobs. Yet, you call it an act of legislative hubris.

Could you explain what you mean by that?

Mr. MYERS. That was bombastic.

Senator FEINSTEIN. Correct.

Mr. MYERS. And I frankly am thinking of that phrase when I said that I used words that were probably a poor choice. So accept that apology, please.

With regard to the specific issue, at the time that I wrote that article the concern that was being expressed to me from ranchers in the California desert area was that after, as you well know, 100 years of stewardship of the land, that by taking their grazing permits and placing them under the authority of the Park Service, which does not have extensive authority regulating ranching, that they would find that they would be no longer to economically ranch in that area.

Senator FEINSTEIN. Let me stop you here. Were you aware at the time that I had specifically crafted that bill so that grazing could continue at the present level?

Mr. MYERS. Senator, yes. I, to your credit, I believe, know that you worked, I believe, quite long and hard with ranchers to try to protect their interests in that area, and that was told to me by those ranchers.

The specific point that I was making on their behalf was that if they were, in fact, unable to continue ranching for economic purposes that they would take with them their water development for the livestock, and that that water development and those water sites they had developed for livestock were redounding to the benefit of a lot of desert animals that needed the water as well as the livestock did.

So the point that I was making in the context of that writing was that it would perhaps have resulted in some unintended consequences once that water dried up, once the ranchers left, and that, in fact, would have had an environmental impact on the animals that used them, the non-domestic animals.

Senator FEINSTEIN. I don't understand that.

Mr. MYERS. Okay. It was explained—and I have never ranched in the California desert, but obviously—

Senator FEINSTEIN. You should go sometime. It is quite beautiful.

Mr. MYERS. Ranchers develop water sites for their livestock throughout that desert region because it is obviously a desert. Other animals, such as big-horn, sheep, deer, and the like, birds, would use those watering sites for their nourishment.

If the ranchers were no longer able to economically ranch, they would leave the area. They would let the water sites either fall into disrepair or they would remove them outright, thus removing not only water for the livestock, but water for the big-horn sheep, the deer, the birds, et cetera.

Senator FEINSTEIN. Which is not quite true, not to debate this because it is not relevant. But they call them guzzlers and there

are a whole series that volunteers place throughout the desert for big-horn sheep and burros and other animals. The bill provided for a willing seller, willing buyer. In fact, some of the ranchers have decided to sell out to the Park Service.

I think the bill was put together in a very sensitive way and I was rather dismayed that you called it legislative hubris, but that is fine because you have used a lot of hyperbole. My concern is that you will take these views into the chamber as a judge, and that, in fact, what they do is show a very restrictive view of the Commerce Clause. And that is a very important clause in terms of giving the Congress the ability to determine law.

So therefore, in the Ninth Circuit, I would be concerned that that restricted view would prevail and that you would be willing under that view to strike down many good things that this Congress does.

Mr. MYERS. If I may respond, Senator, I would ask you also to look at the comment where I used the unfortunate phrase "legislative hubris." I did use a few other phrases that I think were good, one being that environmental stewardship is good business, that environmental stewardship is good citizenship.

And I quoted the famous early 20th century conservationist Aldo Leopold for his statement that conservation means harmony between people and the land. I believe he said something to the effect that when land does well for the land and the people do well by the land—when, by reason of that partnership, both are better off, that is conservation. And that was theme I was trying to run throughout that article.

Senator FEINSTEIN. I would like to ask you a question about property rights. You were counsel of record in the case of *Babbitt* v. *Sweet Home Chapter Communities for a Greater Oregon*, and your brief argued that private property deserves the same level of constitutional protection as speech. Specifically, you wrote that, quote, "Every bit as much as a regulation that restricts speech, the regulation of private property must be held up under the strong light of constitutional scrutiny."

Is it your view of the Takings Clause that environmental regulations deserve the same level of scrutiny as the regulation of speech?

Mr. MYERS. Senator, within that brief—and perhaps a little context will be helpful. That brief was filed on behalf of farmers and ranchers who were concerned that the Corps of Engineers' interpretation of the Clean Water Act would impact an exemption that Congress gave farmers and ranchers to proceed with normal farming and ranching activities, and thus not require a 404 permit.

Now, within that context, the quote that you are referring to was a reference to a Supreme Court decision in 1994, *Dolan* v. *City of Tigard*. In that decision, the Supreme Court said that the Fifth Amendment, and referring specifically to the Takings Clause, was as much a part of the Bill of Rights as the First Amendment and the Fourth Amendment. And the Court went on to say that the Fifth Amendment should not be, to use its words, relegated to the status of a poor relation.

Senator CRAIG. Senator, your time is up.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Mr. MYERS. Thank you.

Senator CRAIG. Let me turn to our colleague from Georgia.

Senator Chambliss, do you have any questions of the nominee?

Senator CHAMBLISS. Thank you, Mr. Chairman.

Before we leave this particular *Sweet Home* case, Mr. Myers, I want to go back and let's make sure we get on the record a real clarification of what you just said because it appears that you stand accused of expressing the radical opinion in an advocacy brief that you filed in 1995 that the Takings Clause in the Fifth Amendment means what it says, namely that private property shall not be taken for public use without just compensation.

Now, the brief I am talking about which you submitted in the Supreme Court is an amicus on behalf of the National Cattlemen's Association. It did not argue that the Endangered Species Act itself was unconstitutional.

Is that correct?

Mr. MYERS. That is correct.

Senator CHAMBLISS. Hadn't the U.S. Supreme Court—and I believe you just stated this, but let me again clarify it—hadn't the Supreme Court at the time of this amicus brief recently decided the *Dolan* case which stated, and I quote, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or the Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances?"

Mr. MYERS. That is the quote to which I referred in the brief.

Senator CHAMBLISS. Right. Let me also note that the Supreme Court stated in the 1972 case *Lynch* v. *Household Finance* that, "The dichotomy between personal liberties and property rights is a fake one. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights and property are basic civil rights has long been recognized," end of quote.

The point is that the fundamentality of property rights in our constitutional system is neither new nor radical. If there is a legitimate effort underway to amend the Constitution to remove the Takings Clause, I am not aware of it. But it is not up to judges to remove it. Until it is legitimately removed, it ought to be respected.

Would you care to comment further on that, please, sir?

Mr. MYERS. Well, Senator, I would not try to draw any hierarchy among the amendments, or for that matter any particular clause of the Constitution. The Constitution speaks for itself and has the status in our Nation and in our democracy that it deserves.

In that brief, I was referring to a statement by the Supreme Court, I think, a year or two prior to the filing of the brief that was specific to a takings issue which did have, I thought, some fair argument to be expressed in the *Sweet Home* litigation which the Court was considering.

Senator CHAMBLISS. The problem your clients had with the Endangered Species Act was that the Babbitt Interior Department regulations defined the term "harm" in the statute in a way that essentially precluded any private landowner's use of property on which an endangered species might find habitat, and, importantly,

that the Government had no intention of compensating affected landowners.

Is that correct?

Mr. MYERS. Well, Senator, thank you for that.

And, Senator Feinstein, I need to correct a statement I made to you in response to the same question. I think I referred to an exemption under 404(f) of the Clean Water Act. The *Sweet Home* case was an ESA case dealing with habitat modification and I was confusing that with the SWANCC. I apologize.

Back to your question, yes, the issue there was whether habitat modification, as suggested in the regulations that were under review in the case, would have an impact on normal farming and ranching activities such that if a rancher went out and modified the habitat, which, of course, is what ranchers and farmers do, whether that would expose them to fairly significant criminal liability. That is why they were interested in filing an opinion in that case.

Senator CHAMBLISS. Those provisions of the statute are, of course, in addition to the Takings Clause of the Fifth Amendment. And I understand that the Supreme Court ruled against your client's position in this case, but it seems to me that the argument is well-grounded in the plain language of the Constitution and the statute at issue that acknowledged the basic validity of the statute cannot be credibly tarred with the empty moniker of "extreme," just as a comment.

Lastly, I notice in your biographical information that you are an outdoorsman, that you enjoy visiting our National parks, and I am sure State parks in the western part of the country. And above and beyond taking vacations in State parks, you give a lot of time, a lot of volunteer time to making sure that our State parks are environmentally safe and clean.

Is that correct, and would you have any comment about your love for the outdoors as it might apply to the way you might form your basis of opinions?

Mr. MYERS. Yes, Senator. I appreciate the question. My love for the out-of-doors was instilled early in me by my father and mother, who are sitting behind me. My father was an assistant scout master, and I soon found myself in Cub Scouts and then Boy Scouts, and progressed to the rank of Eagle Scout.

We as a family would often go camping for our family vacations in State parks, occasionally in national parks. Hunting and fishing are a part of my life today, although not as much as I would like. And I have been fortunate as an adult to continue that. My family and I still camp in national parks and in State parks. I still get out and, in fact, almost on a weekly basis we venture up into the foothills behind Boise, Idaho, into the national forest to recreate.

And as I calculated it, looking at this hearing and what I had done in environmental matters, for the last 15 years I have averaged about 12 days a year volunteering in national parks—Yosemite, Yellowstone, the Smoky Mountains, Rock Creek, Manassas Battlefield Park—doing such things as back-country patrols; visitor interaction; minor first aid; minor law enforcement, like put your dog on a leash; campsite clean-up; trail-clearing and the like.

Senator CHAMBLISS. Well, I commend you for your public service that is over and above what most of us do.

Thank you very much, Mr. Chairman.

Senator CRAIG. Senator Chambliss, thank you very much.

We have been joined by the Chairman of the full Senate Committee and I now turn to Hon. Orrin Hatch.

Orrin?

Chairman HATCH. Well, I welcome all three of you to the Committee, and we are very grateful to the House of Representatives, and specifically the chairman, Jim Sensenbrenner, and the ranking member, Mr. Conyers, for making this room available to us. It is very nice of them under the circumstances, although it looks like later today we should be able to get back to somewhat normal in the United States Senate.

I welcome you all here. Mr. Stengel, I am happy to note that you are a fellow University of Pittsburgh law graduate and worked for Dickie, McCamey, Chilcote, and Robinson. They offered me a job right out of the University of Pittsburgh Law School, and one of the great defense firms in the country. I won't be able to stay for yours and Mr. Duffey's hearing, but I just want to welcome both of you here.

Let me take a few minutes with Mr. Myers.

Mr. Myers, you stated in response to an unfavorable newspaper editorial in November of 2002, quote, "I serve at the pleasure of the President. I will continue to provide the President and Secretary Norton with legal advice in support of their policy goals, just as any lawyer should advocate his or her client's goals within the bounds of professional responsibility and ethical conduct," unquote.

I think I quoted that accurately, and correct me if I am wrong here. The Solicitor's job is not really policymaking, but rather to defend the laws and the policies of the Department which either already exist or are established above your then pay grade. Is that right?

Mr. MYERS. Yes, Mr. Chairman, that is correct. There are different ways to approach the office of the Solicitor. Some, I think, have approached it more as a policy office, and that, I assume, was with the consent of the Secretary for whom he or she served. That was not my approach coming in, and as I was interviewed for the position by the Secretary, I told her that that would not be my desire to come in and make policy, that there were other assistant secretaries in the building who would have that obligation and duty; that my job would be to give her and the constituent organizations within the Department legal advice. She seemed quite satisfied with that and I was hired.

Chairman HATCH. Well, it never ceases to amaze me how some in the media and others whom we could mention seem to think that an advocate should only advocate what they believe rather than what the law says or what the advocate believes the law says, or what the advocate's client believes the law says.

My gosh, we put through 377 Clinton administration judges, and if we took the position that whenever they disagreed with us they shouldn't sit on the bench, my gosh, none of them would have sat on the bench. So it is amazing to me.

Now, you probably wouldn't have accepted the Solicitor's job unless you generally agreed with the policies that you thought President Bush and Secretary Norton would support. I presume that is correct.

Mr. MYERS. Well, probably more accurately, I would have never been offered the job.

Chairman HATCH. Well, probably so.

Now, you spoke to this in the same November 2002 letter to the editor, quote, "I hope it does not come as a surprise that the Bush administration has a different policy from the Clinton administration on innumerable issues, including livestock grazing on Federal lands and the importance of working landscapes and rural communities," unquote.

Now, the question is whether doing your job as Solicitor to defend policies that diverge from the Clinton-Babbitt regime makes you an extremist and an ideologue, unfit for service on the Federal bench. Of course, the answer has to be an emphatic no.

For example, I wonder if the Committee is aware or whether your opponents care that according to the National Journal, quote, "President Clinton filled some of his top environmental jobs with environmental activists," unquote, including Bruce Babbitt himself, the former president of the League of Conservation Voters.

Now, given your record of trying to cooperate with environmentalists, in your words—let me see if I can find those words—quote, "working with all sides to reach a locally-supported consensus and rejecting the scheming of those engaged in the environmental conflict industry," unquote, do you think that former officials from the Babbitt years at Interior ought to be disqualified from Federal judgeships because of their association with Clinton administration policies?

Mr. MYERS. No, I don't. In fact, a friend in the environmental advocacy arena said of me that, had he been President, he may not have nominated me, but that didn't mean I wouldn't make a good Federal judge. I think that was a fair comment and I would hope—

Chairman HATCH. Well, I think it is a fair comment and it is an accurate comment. I mean, my goodness, if we all have to agree on one politically-correct way of thinking, my gosh, we are going to have very few judges that are worth a doggone in this country.

Even some environmentalists agree that their political disagreements with a nominee don't disqualify him or her from the Federal bench. For instance, the Casper Star Tribune, a newspaper normally inclined to criticize the Bush administration, reported in May 2003 that the director of the Northern Rockies office of the National Wildlife Federation said the following about Mr. Myers—basically, what you said—quote, "He has different opinions on policies than I do, but I don't think that makes him unfit to serve on the Federal bench," unquote.

Are you aware of that quote?

Mr. MYERS. I am.

Chairman HATCH. Okay. I agree with that and I would hope that the Committee agrees, especially given all the rhetoric I have heard about how the judiciary ought not to be politicized.

Let me ask one more question along these lines. Among your critics is the National Parks Conservation Association, whose sen-

ior director commented as follows on your nomination, quote, "His history has been in defending commodity uses, not public uses of Federal lands. His confirmation would be another nail in the administration's attempt to hand over public lands to private industry," unquote.

Now, this incoherent conclusory statement assumes several things, first that the clients you have represented in your career are as rigidly ideological as the speaker, who clearly believes that public lands have only one valid use, and that is as scenery; second, that President Bush nominated you to advance a particular policy agenda as a Federal judge.

Would you care to respond to these types of, I think, incompetent attacks?

Mr. MYERS. I wasn't aware of the comments by the National Parks Conservation Association, but I guess with respect to that particular organization, I would stand on my personal record that I cited a moment ago that I have spent my free time in serving national parks, such as picking cigarette butts out of fire pits. I have a great love for the national parks. That is where we recreate and that is where we go for sustenance, for spiritual refreshment, and that is a personally-held view.

The larger view, though, and the one that is really important for this Committee is whether I would carry into a judicial position, if I were so lucky as to be confirmed, an ideology that would result in a bias against or for any litigant.

And I think it should be noted that every nominee, I suspect, that comes before you has both proponents and opponents, and some of those people may hope that once that person becomes a judge that they can either count on them to do the right thing or cower in fear that they will do the wrong thing.

I hope that both of those groups, the proponents and the opponents, are disappointed; that when a person takes on those robes, takes the oath of office, swears to uphold the Constitution, that that means that they will follow the law and the facts, wherever the law and the facts take them, without regard to personal opinion, public opinion, friends, or foes.

Chairman HATCH. My time is just about up, but you do understand the difference between the role of being an advocate and being a judge?

Mr. MYERS. Oh, absolutely. I have been the advocate at the bar pleading my case to the judge. Sometimes I win, sometimes I lose.

Chairman HATCH. And sometimes you are considered right, sometimes you are considered wrong, but you are doing the best you can to advocate for your particular client.

Mr. MYERS. Right.

Chairman HATCH. Now, you understand that your personal beliefs are irrelevant when it comes to deciding what the law really means?

Mr. MYERS. Well, as I mentioned earlier, Senator, Mr. Chairman, if my client wishes me to pursue a colorable argument and does not ask me to act unethically, immorally, or illegally, and that argument has a foundation in the law and is not sanctionable, frankly, under Rule 11, then that person deserves to be heard before the

court, and I will take the best argument that I can muster within those confines.

Chairman HATCH. But as a judge?

Mr. MYERS. As a judge, the judge has a duty to hear both sides, and obviously that is why we have the advocacy system so that there is a balance of views presented to the judge. And then the judge, looking at precedent and with respect for the judicial process and the decisions of the court that has gone before, must determine what the law and the facts say.

Chairman HATCH. Well, I know your reputation. It is an excellent reputation.

Mr. MYERS. Thank you.

Chairman HATCH. I know of your intellectual capacities, and your intellectual capacities are excellent. I know of your honesty; that is excellent. I look at your family behind you and they don't seem to be too odd to me.

Mr. MYERS. Well, I didn't put that in the record.

Chairman HATCH. They look downright good to me, is all I can say. And I suspect that anybody who is fair will judge you on the basis of your reputation, which is a good one, a great one; your family, the honesty that you exhibit, and the abilities that you have. And if they do that, you will be unanimously approved by the U.S. Senate, and that is what I intend to see happen and I hope that it does.

Mr. MYERS. Thank you, Mr. Chairman.

Chairman HATCH. Thank you so much. We are glad to have you here, and the other nominees as well.

Senator CRAIG. Thank you very much, Mr. Chairman.

Let me again turn to my colleague from Illinois, Senator Durbin.

Senator DURBIN. Thank you very much, Mr. Chairman. I have two or three questions that I would like to follow up on.

Mr. Myers, all of us in public life, whether appointed or elected, are naked to our enemies and are the object of accusations, valid and invalid. And I preface my remarks by acknowledging that fact, but asking you if you would for the record, speak to the two investigations by the Inspector General of the Department of the Interior into your conduct at that department.

If you would tell us what the status of each of those investigations is, whether they have been completed, I would appreciate it. You don't have to go into long detail on these. We have them before us, but if you would tell us your side of the story for the record, I would appreciate it.

Mr. MYERS. Well, certainly, I would be happy to. You mentioned two investigations into my conduct. Actually, there was only one into my conduct. The other was with regard to conduct of attorneys in my office and I was interviewed as part of that process. That dealt with an issue as to whether a settlement reached in some administrative litigation was legal or not.

Senator DURBIN. The Frank Robbins—

Mr. MYERS. That is correct, yes, sir. I was not involved in the negotiations or discussions of that settlement, other than to tell a subordinate attorney that he had authority to try to settle that case.

Senator DURBIN. Did you approve the settlement?

Mr. MYERS. No, I did not.

Senator DURBIN. Were you aware of the terms of the settlement?

Mr. MYERS. No.

Senator DURBIN. So it went from your subordinate's decision to what level before it was policy of the Department?

Mr. MYERS. Well, the subordinate attorney worked with the Bureau of Land Management, which was the party on behalf of the Department of the Interior to the settlement. Some 6 months after the settlement was signed, press reports came out with statements that it was perhaps illegal. Obviously, I saw those press reports. I asked for a copy of the agreement.

I then dispatched different attorneys in my office to look into the allegations, together with employees from the assistant secretary's office who has authority over BLM. So I initiated in my own right an inquiry into the statements to determine whether or not they were correct.

Senator DURBIN. Excuse me, but in the initial settlement negotiations you played no role?

Mr. MYERS. That is correct.

Senator DURBIN. And did not review them once they were agreed to?

Mr. MYERS. Right.

Senator DURBIN. And you are saying that is standard procedure?

Mr. MYERS. Well, it was in that case for me, Senator, because I only knew it as an administrative piece of litigation, which is to say it was wholly contained within the Department of the Interior as a dispute between the BLM and the rancher. That is how it was presented to me, so it did not seem particularly remarkable and if this attorney wanted to try to settle that, then fine.

Senator DURBIN. On the first instance, the Inspector General's investigation of your relationship with your previous and now current law firm—

Mr. MYERS. Yes, right.

Senator DURBIN. —would you speak to that?

Mr. MYERS. I will. August of last year, I actually received a call from a reporter from the Washington Post asking me to respond to some statements. Rather than respond with complete lack of understanding, I instead went about finding what this was and determined that a couple of groups had looked at my entries on my planning calendar, and based on those entries in the planning calendar they raised concerns that I was violating my ethical obligations under relevant statutory and regulatory provisions, as well as an agreement that I entered into prior to entering the Department.

When I saw the seriousness of the allegations, I went to the Secretary of the Interior, I told her, and I asked her in writing to initiate an investigation, which she did by contacting the Inspector General. Simultaneously, those allegations had been forwarded to the Office of Government Ethics. They also asked the IG to look into it.

The IG undertook a, I think, three-month review, looking not only at the meetings that were on the planning calendar, but essentially at everything I had done over the last two-and-a-half years. The IG produced his report and gave it to the Office of Government Ethics, who had requested it officially.

The Office of Government Ethics wrote back to the two groups and stated, in summary, basically that Mr. Myers showed a strong intention to comply with the statutes, regulations, and obligations that he had ethically, and that, in fact, he did so.

Senator DURBIN. I would ask you to clarify two things. In the Inspector General's report, they indicate that they initiated their inquiry not on the basis of your request, but rather a complaint received on August 5 from Public Employees for Environmental Responsibility and Friends of the Earth.

And the second part—and I don't know the answer to this; perhaps you have just given me the answer—they say the Office of Governmental Ethics therefore requested that an investigation ascertain the specifics of the discussions that took place during each of the 27 meetings in order to determine if Myers had actually violated the terms of his ethics agreement or the criminal conflict of interest law.

I took it from that that even though this was issued November 24 of last year that it is still ongoing; there are still aspects of this investigation ongoing. Is that true?

Mr. MYERS. No, sir. It is closed.

Senator DURBIN. It is closed.

Mr. MYERS. The Office of Government Ethics issued its written opinion on the 5th of December. And with regard to how this matter came to the IG's attention, I guess I frankly don't know whether the two groups forwarded their concerns on August 5 directly to the IG. I know they did forward them directly to the Office of Government Ethics by a letter, and when I heard about it I just—before the OGE asked for an inquiry, I went to the Secretary and said please get to the bottom of this.

Senator DURBIN. Now, when you went to work for the Department of the Interior, you, I think—tell me if this is true—represented that you would not get involved with your former law firm or clients for a period of time in the Department of the Interior. Is that correct?

Mr. MYERS. That is basically correct. There are a series of regulations that apply to that.

Senator DURBIN. Now, do you feel then that it would be appropriate if you are successful in this nomination to recuse yourself from cases involving your former law firm or former clients?

Mr. MYERS. Well, what I would do—and what this episode was useful for was providing me with an excellent reminder of the importance of the rules of conduct that are applicable to any Federal official, including judges. So if I am fortunate enough to be confirmed, the first order of business will be to crack the Code of Judicial Conduct and put it on my desk, understand it thoroughly, and find out how a judge goes about dealing with recusal issues. Frankly, sitting here, I don't know the answers to those questions.

Senator DURBIN. Well, I want to give you some time to look at that code and then respond to the question I just asked. I will send that to you in writing with a few other questions, if you don't mind, Mr. Chairman.

Let me ask you about this property rights debate that we have been involved in here and your reference to the Dolan decision. I want to make sure I can put this in the context of other issues that

might present themselves or have presented themselves to the courts.

If you believe, if it is your point of view that Dolan says that property rights are equal to rights of free speech and other rights guaranteed under the Bill of Rights, I would like to ask you how then you think we should have resolved issues like civil rights, where we said that the fact that you own the restaurant and the fact that you own the hotel and it is your property is not enough for you to discriminate against Americans based on their race. Clearly, we decided—at least the courts decided that property rights were trumped, overruled by more important rights. How do you resolve that?

Mr. MYERS. I think the answer is in the Supreme Court's decisions, Senator. The Supreme Court, in interpreting the Takings Clause and the Fifth Amendment, has never interpreted it as an absolute. The Court, since the landmark case of *Pennsylvania Coal* v. *Maine* in, I think, the 1920's basically said that property rights are subject to reasonable regulation by government entities.

And we, of course, have that everyday. Where I live, where you live, we are all subject, and our property rights are subject to city, county governments, as they should be. So it becomes a matter of degree and a matter of context. If there is a physical invasion by the government of one's property, you are likely to have a better chance of making out a case for a takings. If it is a, quote, "invasion" of your property rights by economic regulation, you have a less chance of making out a takings. And the court has over the years tried to structure a format and a context in which to make that analysis. It has done so through the Dolan case and others.

Senator DURBIN. Let me ask you, following up on your analogy here, was not the passage of the Americans With Disabilities Act, in fact, a physical invasion of the property rights of individuals, a requirement that certain entities—businesses, localities and such—change the property that they own to accommodate Americans with disabilities? And would you view this as an improper takings?

Mr. MYERS. On that one, I am going to hesitate because I don't know whether that particular question has been litigated or is in litigation or may come before me if I were to become a judge. I think it is fairly obvious that accommodations for persons with disabilities impacts one's property. Whether that rises again to the level of a takings, I don't know.

Senator DURBIN. Let me just close, if I might, Mr. Chairman, by—you have written two stirring defenses of Robert Bork's nomination to the Supreme Court and said in one of them, the Denver Law Review, "Judge Bork's judicial philosophy was well within the parameters of acceptable constitutional theory, worthy of representation on the Supreme Court." Judge Bork stated and believed that *Griswold* v. *Connecticut*, which established the right to privacy, was an unprincipled decision. Do you share that view?

Mr. MYERS. No, Senator. *Griswold* is probably the bedrock decision in the right of privacy string of cases that the Supreme Court has decided. It is regularly cited in subsequent Supreme Court decisions such as *Planned Parenthood of Southwest Pennsylvania* v. *Casey* and *Roe* v. *Wade* and other decisions. So I think that is well-settled.

Senator DURBIN. Do you think Bork's position, then, was in the mainstream and should have been represented on the Supreme Court?

Mr. MYERS. My comment in that regard was, I think, back in 1988, maybe 1990, when I was fairly fresh out of this Committee's chambers, having been Senator Simpson's staffer on the Bork nomination. And the point that I was making was that it was not particularly my personally-held view of his status within the mainstream, but with reference to others whose opinions were worthy of consideration.

Specifically, Justice Stevens said that he was very well qualified and would be a welcomed addition to the Court. Former Chief Justice Burger said that it would shock him to think that Judge Bork was any more of an extremist than he himself was. The ABA had given Judge Bork its highest rating. Based on that, it seemed to this lowly staffer's opinion that that was somewhere in the mainstream.

Senator DURBIN. Thank you, Mr. Myers, for your patience and cooperation.

Mr. Chairman, thank you, and I would like to ask on behalf of Senator Leahy that this letter from professors in the Ninth Circuit be entered into the record at this point.

Senator CRAIG. Without objection.

Senator DURBIN. I would also like to express my apologies to the other nominees and their families, who have waited with varying degrees of success—Mr. Duffey and Mr. Stengel—for their opportunity to come before the Committee. Thank you very much.

Senator CRAIG. Thank you.

Let me turn to my colleague from Georgia for any further questions he might have of nominee Myers.

Senator CHAMBLISS. Mr. Chairman, just very quickly—Mr. Myers, I want to go back to this Robbins settlement issue just to make sure that we are very clear as to the status of that.

Do you recall the first time you actually reviewed the settlement that was executed in December of 2002 and January of 2003 between the BLM office in Wyoming and Frank Robbins, who was a Wyoming rancher?

Mr. MYERS. It was approximately a half year after it was entered into.

Senator CHAMBLISS. And what evidence did the various environmental activist groups cite in support of their contention that you, quote, "specifically authorized the settlement," close quote?

Mr. MYERS. I think there is some confusion there. What I specifically authorized was a subordinate attorney's attempt to try to reach a settlement between two parties.

Senator CHAMBLISS. We understand the Department of the Interior IG report that has already been referred to is currently investigating one field solicitor and perhaps others who were directly involved in negotiating this Robbins settlement.

Didn't you have a role in appointing the investigative team which was chosen specifically because they had no connection with the Robbins matter?

Mr. MYERS. That is correct. I asked the Associate Solicitor for Lands and Minerals Management to work with an appointee cho-

sen by the assistant secretary with authority over that area and for the two of them to see if they could get to the bottom of it.

Senator CHAMBLISS. Is there any conceivable reason why you would be a target of the Robbins investigation?

Mr. MYERS. Well, no, and as far as I understand, I am not.

Senator CHAMBLISS. In fact, I would like to state for the record that I have received information that the IG in charge of the Robbins settlement, Mr. Chairman, will provide written confirmation to the Committee that, in fact, Mr. Myers was not a target of this investigation. Such a letter will simply clarify the obvious that there is complete absence of evidence that the Robbins settlement, assuming there is something improper about it, reflects poorly on Mr. Myers' conduct while he served as Solicitor.

Thank you, Mr. Chairman.

Senator CRAIG. I thank you, Senator, and when that is available, we will make that a part of the record.

Let me close so that we can move to our other nominees, and I appreciate everyone's patience. I think you can see that we here on the Judiciary Committee take all nominations very seriously, for the obvious reason that those of you who are successful will wield a great deal of power in a lifetime appointment over the citizens of our country. It is critically important that we understand your judicial temperament, your background, your capabilities, and try to ascertain from that your sense of the law and your responsibilities in it.

In my opinion, the Ninth Circuit needs Bill Myers. Of the circuit's 26 active judges, 17 were appointed by Democrat Presidents. Only nine judges are Republican appointees. A remarkable 14 of the 26 judges—that is 54 percent of the court—were appointed by President Clinton. In 2000 alone, a presidential election year, President Clinton appointed four judges to the court.

Let me also note—and I wish my colleague, Senator Schumer, were here, but I will dutifully note his absence, noting that I am not speaking behind his back. I do want to note what Senator Schumer said about Bush's nominee to the Ninth Circuit, Judge Jay Bybee, before voting to confirm him to that court.

Here is what Chuck Schumer said: "Jay Bybee, make no mistake about it, is a very conservative nominee. It is fair to put him in a similar category with many of the more conservative nominees we have had. If Mr. Bybee were nominated to another court that is hanging in the balance or where most of the nominees were conservative, I would probably vote against him. If he were nominated to the Supreme Court, for example, there would be a difficult calculus. But Mr. Bybee is nominated to the Ninth Circuit Court. The Ninth Circuit is by far the most liberal court in the country." Most of the nominees are Democrats, from Democrat Presidents, as I have quoted the record. "It is the court that gives us the pledge of allegiance case, which is way out of the mainstream on the left side. Therefore, I think Jay Bybee will provide some balance."

Similarly, confirming—and these are now my words—similarly, I believe that confirming the nominee that is before us today, Bill Myers, will take another step in restoring what is important, a measurement of balance, to the Ninth Circuit.

I thank you very much for being before us, Bill. I think you have represented your case and your presence admirably. And we will look forward, I hope, to speedy completion and confirmation of you. Thank you very much.

Mr. MYERS. Thank you, Senator.

Senator CRAIG. Well, let me again state, as the Chairman did, how much we appreciate everyone else's patience and tolerance today. I have watched your faces go from those of bright and alert to sometimes a rather dull glaze. So let's get bright and alert again, if you will, because we will not detain any of you very long. It is obvious by the exit from the room at this moment that while many of you may have thought the audience had gathered in your behalf, that is probably not the case. So I would ask William Duffey and Lawrence Stengel to please come forward.

While you are standing, will you please raise your right hand and repeat after me? I do swear that the testimony that you are about to give before the Committee will be the truth, the whole truth and nothing but the truth, so help you God.

Mr. DUFFEY. I do.

Judge STENGEL. I do.

Senator CRAIG. Please be seated. Some of you have had your families introduced, but let me give both of you that opportunity. I think we all recognize the privilege that you have been—the nomination is a privilege, certainly, and I think you all respect that highly.

Mr. Duffey, let me again turn to you for the purpose of introduction of your family, if you would.

STATEMENT OF WILLIAM S. DUFFEY, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF GEORGIA

Mr. DUFFEY. Thank you, Mr. Chairman. It is indeed a privilege to be afforded this opportunity to be considered by the United States Senate for confirmation, as it has been a privilege to be nominated by the President of the United States to this post. But I would not be here without my family: Betsy, who is my wife of almost 27 years, and my two sons, Charles and Scott, who have been instrumental in supporting me throughout this process.

[The biographical information of Mr. Duffey follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

William Simon Duffey, Jr.

2. Address: List current place of residence and office address(es).

Residence
Atlanta, Georgia

Business
Office of the United States Attorney
600 Richard B. Russell Federal Building
75 Spring Street, SW
Atlanta, Georgia 30303

3. Date and place of birth.

May 9, 1952 -- Philadelphia, Pennsylvania

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married: Betsy Byars Duffey
Maiden Name: Betsy Ann Byars
Occupation: Children's author, self-employed, works at home

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Drake University (1970 - 1974) (B.A. December 1973;
Graduate work from January through May 1974)

University of South Carolina (1974 - 1977) (J.D. May 1977)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

2001 - Present	**Office of the United States Attorney Northern District of Georgia**	**United States Attorney**
2000	**University of South Carolina**	**Adjunct Professor**
2000 - 2001	**New Century Club, Inc.**	**Board of Directors, Secretary**

1995 - 2001	Georgia Wilderness Institutes, Inc.	Trustee
1995 - 2001	Good Government for Georgia -- Coverdell Leadership Institute	Board of Advisors, Chair
1995 - 2001	King & Spalding, LLP Atlanta, Georgia	Partner
1988 - 1996	Drake University	Board of Trustees
1994 - 1995	Office of the Independent Counsel - Whitewater Little Rock, Arkansas	Deputy Independent Counsel; Associate Independent Counsel
1981 - 1994	King & Spalding, LLP Atlanta, Georgia	Associate; Partner
1978 - 1981	United States Air Force Ankara, Turkey and Montgomery, Alabama	Assistant Staff Judge Advocate; Circuit Trial Counsel
1977 - 1978	Nexsen, Pruet, Jacobs & Pollard, LLP Columbia, South Carolina	Associate
1976 - 1977	University of South Carolina School of Law Columbia, South Carolina	Legal Writing Instructor
1976	Turner Padgett Graham & Laney Columbia, South Carolina	Summer Employee
1975	Ackerman & Butler Walterboro, South Carolina	Summer Intern
1974	Boy Scouts of America Wadmalaw Island, South Carolina	Aquatics Director

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

1978 - 1981 **United States Air Force Judge Advocate General Corps, Captain, [redacted]88**
Honorable Discharge

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

AFROTC College Scholarship
Drake University Honor Scholarship
Drake University Honors Graduate

University of South Carolina *cum laude* graduate
Order of the Wig and Robe Law School Honor Society (now Order of the Coif)
Who's Who in America (1994 - present)
Atlanta Track Club Outstanding Service Award
Leadership Atlanta 1999
USAF Meritorious Service Medal

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

1977 - Present	**South Carolina Bar (Out-of-State Member of Board of Delegates from 1990 - 1993)**
1982 - Present	**Georgia State Bar**
1982 - Present	**Atlanta Bar Association**
1985 - 1988	**Atlanta Bench Bar Committee on Alternative Dispute Resolution (Chair)**

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Lobbying Organizations

None

Other

Leadership Atlanta
The Commerce Club
National Republican Lawyers Association
Soque Wilderness Homeowners Association
Atlanta Track Club - Peachtree Road Race Committee
St. John United Methodist Church
Atlanta Chapter, Federalist Society
North Georgia Walk to Emmaus
Soque River Association
New Century Club, Inc. (Now New Century Forum of The Commerce Club)

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Supreme Court of the United States (1992)
United States Court of Appeals, Eleventh Circuit (1987)
United States District Court, Northern District of Georgia (1982)
United States District Court, Eastern and Western Districts of Arkansas (1994)
United States Court of Military Appeals (1978)

South Carolina Supreme Court (1977)
Georgia Supreme Court (1985)
Georgia Court of Appeals (1982)

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Published Material

"Radial Keratotomy on Trial: New Surgical Procedures and the Antitrust Laws," Refractive Keratotomy for Myopia and Astigmatism, Mosby (1992), and Journal of Refractive Surgery (1988)

"Attorney's Fees in Business Disputes: Who Really Bears the Burden," Georgia State Bar Journal (1993)

"Collective Knowledge and Willful Blindness - New Liability Under Old Law," South Carolina Lawyer (1994)

"Competitive Information Collection: Avoiding Legal Land Mines," Competitive Intelligence Review, John Wiley & Sons, Inc. (2000)

Competition and Business Wrongs (Collection of articles and cases for use in University of South Carolina Law School course during the Fall 2000 semester.)

"Corporate Fraud and Accountability: A Primer on Sarbanes-Oxley Act of 2002," South Carolina Law Review (2002)

Speeches (Outlines enclosed except as noted)

Atlanta Bar Association, White Collar Crime CLE seminar panel discussion with section chiefs in my office: Priorities of the United States Attorney's Office (January 18, 2002)

Atlanta Bar Association, Criminal Law Section luncheon speech: Why I elected to enter public service (January 9, 2002)

Ft. McPherson Army JAG Law Day Breakfast: The responsibilities and rewards of public service (May 1, 2002)

IRS Criminal Investigation Division Senior Managers Conference: Leadership and the Management of People (February 4, 2002)

Atlanta Chapter, Federalist Society: The Federal Strategy to Combat Drug Trafficking (September 12, 2002)

National Meeting of Postal Inspectors: The relationship between United States Attorney's Offices and the Postal Inspection Service and our call to public service (January 28, 2003)

DeKalb County Government Senior Staff: Creating an ethical culture in an organization (June 18, 2002)

Nursing Home Fraud Task Force meeting: The scope of nursing home fraud in the district and the need for an interagency approach to investigation and prosecution (May 9, 2002)

Community Forum on National Origin Discrimination: The responsibility of the United States Attorney's office to protect against discrimination (July 11, 2002)

Metropol (organization of public and private sector law enforcement) luncheon: The strategy to combat drug trafficking (August 7, 2002)

Metro Atlanta Crime Analysis Association conference: The role of the crime analyst and the need for federal-state-local law enforcement cooperation (July 24, 2002, no outline)

Anti-terrorism conferences for state and local law enforcement officers and prosecutors: (three conferences): The need for interagency cooperation and information sharing (January 14, 2002)

INFRAGARD breakfast (organization of private sector loss prevention and security employees): The provisions of the Patriot Act (March 11, 2003)

Anti-Defamation League, United States Attorney's Office and FBI sponsored conference on domestic terrorism introductory remarks (March 25, 2003)

CDC/DOJ Joint Bioterrorism training: The need for federal-state-local cooperation in the war on terrorism (April 24, 2003)

Georgia CLE conference-Securities Regulatory Practice: The federal strategy to focus on corporate fraud (November 8, 2002)

King & Spalding litigation team luncheon: The role of the United States Attorney, my public service experience and our OCDETF and anti-terrorism strategies (October 28, 2002 and June 24, 2003)

INS Naturalization ceremony: The opportunity our country presents and our responsibility to contribute to our country (February 28, 2003)

ATF sponsored Firearms Dealers Awareness Seminar: The laws regulating the sale of firearms and the responsibility of federal firearms licensees to comply (April 23, 2003)

Cherokee County Chamber of Commerce Law Day Luncheon: The role of the lawyer in our legal system and the courage of lawyers and our founding fathers to protect our liberties (April 29, 2003)

Georgia Pacific Asian Bar Association Annual Dinner: Our call to service to our profession and the public (June 26, 2003)

National Association of Black Narcotics Agents: The threat posed by drugs in our country and the need for interagency cooperation to attack major organizations (July 7, 2003)

National Black Prosecutors Association: Martin Luther King's call to action and our role as prosecutors to respond as lawyers and citizens to the needs of our community (August 11, 2003)

Georgia CLE seminar on internal investigations: The Principles of Federal Prosecution of Business Organizations and their application in our district (September 11, 2003)

Lawrenceville First Baptist Church commemoration of the anniversary of September 11, 2001: The need to reach out to the members of the Islamic community (September 7, 2003, no outline)

Atlanta Bar Association Litigation Section: Management of law enforcement priorities - OCDETF and corporate fraud (November 14, 2003)

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. Last physical examination: June 18, 2003

14. Judicial Office: State (chronologically) any judicial offices

you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

2001 - Present **United States Attorney for the Northern District of Georgia (Appointed)**

1994 - 1995 **Deputy and Associate Independent Counsel, Office of the Independent Counsel (Appointed)**

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

No

2. whether you practiced alone, and if so, the addresses and dates;

No

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

07/77 - 12/77 Nexsen, Pruet, Jacobs & Pollard, LLP
1441 Main Street, Suite 1500
Columbia, South Carolina 29201
Associate

01/78 - 02/80 United States Air Force
Office of the Judge Advocate General
HQ TUSLOG, Ankara, Turkey
Assistant Staff Judge Advocate

02/80 - 12/81 United States Air Force
2d Circuit Judiciary
42ABW/JA, 50 Lemay Place
127 NE, Building 804
Montgomery, Alabama 36113
Circuit Trial Counsel

12/81 - 02/94 King & Spalding, LLP
191 Peachtree Street
Atlanta, Georgia 30303
Partner/Associate

02/94 - 09/95 Office of the Independent Counsel
Two Financial Center
10825 Financial Center Parkway
Little Rock, Arkansas 72211
Deputy Independent Counsel
Associate Independent Counsel

09/95 - 11/01 King & Spalding, LLP
191 Peachtree Street
Atlanta, Georgia 30303
Partner

11/01 - Present Office of the United States Attorney
Northern District of Georgia
600 Richard B. Russell Federal Building
75 Spring Street, SW
Atlanta, Georgia 30303
United States Attorney

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

07/77 - 12/77: Nexsen, Pruet, Jacobs & Pollard
Columbia, South Carolina

As an associate waiting to go on active duty with the U.S. Air Force, I was assigned general legal research and litigation support projects.

01/78 - 02/80: HQ TUSLOG, Ankara, Turkey

I attended the Judge Advocate General's School in Montgomery, Alabama for six weeks, beginning on January 4, 1978. After completion of the course, I began my initial assignment at HQ TUSLOG in Ankara, Turkey. My duties varied. I served as the Legal Advisor to the United States Training Mission in Saudi Arabia, served as a Foreign Trial Observer of criminal prosecutions by the Turkish authorities against U.S. Armed Forces personnel, represented the United States in labor contract negotiations with the Turkish Union that represented the Turkish employees employed to work at our installation, served as the Legal Advisor to a NATO amphibious assault exercise, and fulfilled other general responsibilities in the Judge Advocate's Office.

02/80 - 12/81: Maxwell Air Force Base, Montgomery, Alabama

I represented the government in criminal felony prosecutions of Air Force personnel in the southeastern United States and the Republic of Panama. I prosecuted all actions against officers. Cases ranged from fraud to rape to drug trafficking offenses.

02/94 - 09/95: Office of the Independent Counsel Little Rock, Arkansas

I was responsible for three aspects of the Whitewater investigation and, as Deputy Independent Counsel, I supervised all aspects of the Arkansas phase of the investigation. I was involved in responding to press inquiries and represented the office in meetings with members of Congress and White House personnel. I consulted in the investigation after returning to private practice.

12/81 - 02/94 and 09/95 - 11/01: King & Spalding, LLP Atlanta, Georgia

My practice at King & Spalding, LLP focused on complex civil and criminal litigation including corporate commercial disputes, fraud, commercial espionage and trade secret cases, ethics representations and counseling on campaign finance matters.

11/01 - Present: United States Attorney Atlanta, Georgia

I am responsible for all criminal prosecutions in this district and for the representation of the United States in civil actions filed in the district. As the

principal law enforcement officer in the district, I am charged with setting law enforcement priorities and working with federal investigative agencies, as well as state and local law enforcement, in pursuing these priorities. As the Core City Attorney and Chair of the Advisory Council for the Southeast Region Organized Crime Drug Enforcement Task Force, I am responsible for developing and implementing our strategic plan to disrupt and dismantle drug organizations operating in the seven-state Southeast Region. Currently, I supervise approximately 80 Assistant United States Attorneys and the staff that supports them.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

During my years in private practice, my typical clients were corporations and corporate officers and directors. Although a majority of my clients were corporate entities and their executives, I also represented individuals and non-profit corporations. My practice involved civil and criminal litigation, internal investigations of individuals and entities, ethics counseling and representation of clients in state and federal ethics investigations and proceedings. My litigation practice from 1981 through 1984 focused on automobile products liability cases and antitrust litigation. In 1985, my focus shifted to complex business litigation and I began my involvement in internal corporate investigations and the representation of clients in government inquiries. In 1995, my practice became more heavily weighted in fraud cases and in 1997 I began developing a practice in trade secret and commercial espionage investigations and litigation.

In each of my public service assignments, my principal responsibility was to represent the United States in (i) the prosecution of federal crimes and (ii) civil law matters.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

From 1980 to 1981, my practice involved trial work exclusively. During that period I was involved in over 40 cases, approximately half of which were tried.

While involved in the Whitewater investigation, I made several court appearances and appeared regularly before the grand jury.

In private practice at King & Spalding, LLP, I made numerous court appearances, including motions arguments and trials. I represented clients at ethics hearings, an arbitration before the Screen Actors Guild and in a congressional investigation.

As the United States Attorney, I have tried an illegal firearms case and a mail fraud/money laundering case. I have represented the United States in two appeals filed by the government in the United States Circuit Court of Appeals for the Eleventh Circuit.

2. What percentage of these appearances was in:

   (a) federal courts; **70%**

   (b) state courts of record; **30%**

   (c) other courts.

3. What percentage of your litigation was:

   (a) civil; **65%**

   (b) criminal. **35%**

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

   Sole counsel: 5

   Chief counsel: 24

   Associate counsel: 2

5. What percentage of these trials was:

   (a) jury; **80%**

   (b) non-jury. **20%**

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;

   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and

(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1a. United States v. Belz, General Court Martial (1982). This was a prosecution against an officer who ran the hospital pharmacy who was selling controlled substances to individuals, including enlisted members. As lead prosecutor I made all arguments, witness interrogations and cross-examinations, with the exception of a few witnesses whose direct examination was conducted by the local JAG officer.

1b. United States v. Cook, General Court Martial (1981). Charges were filed against a missile launch officer for selling confidential missile launch information to the Soviet Union. The case was dismissed on a finding that Air Force officials granted immunity to the accused to obtain information regarding the nature of the information sold to the Soviet government. As co-prosecutor I handled the investigation with my co-counsel and developed our appellate strategy.

It is difficult to locate the co-counsel, opposing counsel and the judges before whom I appeared in the Air Force. The following individuals served as opposing counsel during my Air Force career and are the people who can best describe my involvement in these matters. I appeared before Judge Michael D. Wims in several cases and I also have provided information on how to contact him.

Judge: Michael D. Wims
Assistant Attorney General
236 State Capital
Salt Lake City, Utah 84114
(801) 366-0260

Opposing Counsel: Michael Anthony
Carson Messinger Elliott Laughlin & Ragan P.L.C.C.
Suite 1900
3300 North Central Avenue
Phoenix, Arizona 85012
(602) 264-2261

Charles H. Wilcox, II
Senior Counsel
XO Communications, Inc.
11111 Sunset Hills Road
Reston, Virginia 20190
(703) 547-2000

United States v. John Thompson, Criminal Action No. 1:02-CR-706-ODE, United States District Court for the Northern District of Georgia (August 2003). This was the prosecution

of conspiracy, mail fraud and money laundering charges based on defendant's participation in a "phantom timber" scheme to defraud Weyerhaeuser Corporation of over $6.5 million. Defendant was convicted on all counts. I was lead counsel in the case and made the opening statement, rebuttal closing, conducted half of the direct and cross examinations and cross-examined the defendant.

Judge:	The Honorable Orinda D. Evans
Co-counsel:	Phyllis B. Sumner Assistant United States Attorney 600 Richard B. Russell Federal Bldg. 75 Spring Street, SW Atlanta, Georgia 30303 (404) 581-6053
Opposing Counsel:	Andrew J. Ekonomou Michael G. Lambros Ekonomou Atkinson & Lambros, LLC 450 The Hurt Building 50 Hurt Building, SE Atlanta, Georgia 30303

United States v. Clark, 337 F.3d 1302 (11th Cir. 2003). This was an appeal of the trial court's decision to suppress evidence. The issue on appeal was the scope of a law enforcement officer's authority under Terry v. Ohio and Illinois v. Wardlaw to detain, for the purpose of investigation, an individual present at a crime scene. On June 16, 2003, the Court of Appeals vacated the District Court's order granting the defendant's motion to suppress and the case was remanded. I developed our briefing strategy and argued our case before the court.

Judges	The Honorable Rosemary Barkett, Stanley Marcus & Arthur L. Alarcon
Co-counsel:	Todd C. Alley Assistant United States Attorney 600 Richard B. Russell Building 75 Spring Street, SW Atlanta, Georgia 30303 (404) 581-6079
Opposing Counsel:	Curtis L. Hubbard, Jr. 852 Ralph David Abernathy Blvd, SW Atlanta, Georgia 30310

Westvaco v. South Carolina Highway Department, et al., Civil Action No. 2:85-0825-2, United States District Court for the District of South Carolina (1985). This action challenged the sufficiency of the Environmental Impact Statement ("EIS") for the proposed Cooper River Bridge as a component of the Mark Clark Expressway in Charleston, South Carolina.

Westvaco alleged the EIS did not address water vapor which under certain atmospheric conditions created fog, and thus a significant danger to drivers, at the bridge site. Westvaco demanded that the Court require a supplemental EIS to address the fog issue. Westvaco proved the United States did not address this safety issue and the Court required a supplemental EIS to be developed. The Court refused to allow the bridge to open until the fog issue was properly addressed and resolved. I developed our litigation strategy, opened, and conducted the majority of the direct and cross-examinations. I represented Westvaco.

Judge:	The Honorable T. Weston Houck
Co-Counsel:	G. Dana Sinkler Warren & Sinkler, LLP Suite 340 171 Church Street Charleston, South Carolina 29401 (843) 577-0660
Opposing Counsel:	Keith Babcock Lewis, Babcock & Hawkins, LLP P.O. Box 11208 Columbia, South Carolina 29211 (803) 771-8000

AmericasMart Real Estate, L.L.C. v. OneCoast Network Corporation, Civil Action File No. 2000CV26165, Fulton County Superior Court (2000). This action for breach of contract and dispossessory was brought by a landlord against the tenant of multi-million dollar lease. Verdict was returned for the landlord. The case was settled while on appeal. As lead plaintiff counsel I made the opening and closing arguments and conducted the majority of the direct and cross-examinations, including the cross-examination of the principals of the defendant. I represented AmericasMart.

Judge:	The Honorable Elizabeth E. Long
Co-Counsel	Jack M. Williams King & Spalding, LLP 191 Peachtree Street Atlanta, Georgia 30303 (404) 572-4600
Opposing Counsel:	Thomas J. Gallo Robins, Kaplan, Miller & Ciresi LLP 2600 One Atlanta Plaza 950 East Paces Ferry Road, NE Atlanta, Georgia 30326-1119 (404) 233-1114

United States v. Christopher Wade, Criminal Action No. LRCR 95-48(1), United States District Court for the Eastern District of Arkansas (1995). This was an investigation and prosecution of Mr. Wade for bankruptcy and bank fraud involving property located in the Whitewater Estates. Mr. Wade plead guilty to the offense and was sentenced to incarceration. I was the lead prosecutor on the matter and handled all aspects of the case, except sentencing.

Judge: The Honorable Susan Webber Wright

Opposing Counsel: Jack Lassiter
Lassiter & Hatfield
Suite 502, 401 W. Capitol Avenue
Little Rock, Arkansas 72201
(501) 374-9010

Willis v. Healthdyne, Inc., Superior Court of Cobb County, Georgia, 191 Ga. App. 671, 382 S.E.2d 651 (1989). Action brought against manufacturer of secured stock purchase plan. After the presentation of all the evidence to the jury, the court granted a directed verdict for the defendant. The decision was sustained on appeal. As co-counsel I split direct and cross-examination of witnesses and made the directed verdict argument on which we prevailed. I represented Healthdyne.

Judge: The Honorable Dorothy Robinson

Co-counsel: William A. Clineburg
King & Spalding, LLP
191 Peachtree Street
Atlanta, Georgia 30303
(404) 572-4701

Opposing Counsel: Robert E. Casey, Jr.
James E. Gilson
Casey, Gilson & Leible, P.C.
Six Concourse Parkway
31st Floor
Atlanta, Georgia 30328
(770) 512-0300

Home Insurance Company v. Thomas Industries, Inc., 896 F.2d 1352 (11th Cir. 1990). Represented the Appellant in this complex appeal from the dismissal of appellant's lawsuit based upon improper venue. In the appeal the Appellant showed it was likely to pierce the corporate veil and establish the weight of the defendant's contacts within the Northern District of Georgia thus establishing venue in the Northern District. The Court of Appeals reversed and remanded. I conducted pre-trial discovery and drafted our successful motion to dismiss and our appellate brief.

Judges:	The Honorable Phyllis A. Kravitch, Frank M. Johnson, Jr. and Elbert P. Tuttle
Co-counsel:	The Honorable Larry D. Thompson 2015 Wallace Road Atlanta, Georgia 30331 (404) 349-5297
Opposing Counsel:	J. Scott Jacobson Holt Ney Zatcoff & Wasserman Suite 600 100 Galleria Parkway, NW Atlanta, Georgia 30339-5911 (770) 956-9600

Lykes v. Hudson Pulp & Paper Company, Civil Action No. 87-1090-CIV-T-15C, aff'd per curiam January 22, 1990, United States District Court for the Middle District of Florida (1990). Action to require Georgia Pacific, successor to Hudson Pulp & Paper Company, to award damages of over $5 million to remove eucalyptus trees in agricultural paper-making experiment. District Court granted defendant's motion to dismiss the complaint based on terms of the lease. The dismissal was upheld on appeal. As co-counsel, I conducted all written discovery, all but one deposition and developed our trial and appellate strategy and briefs. I represented Georgia Pacific.

Judge:	The Honorable William Castagna
Co-counsel:	Ralph B. Levy King & Spalding, LLP 191 Peachtree Street Atlanta, Georgia 30303 (404) 572-4852
Opposing Counsel:	Charles W. Pittman 400 North Tampa Street Tampa, Florida 33602-43719 (813) 273-4232

Crawford & Company v. E.R. Renfroe & Company, Civil Action No. E-41748, Fulton County Superior Court (1999). Action brought against officer of a company for theft of trade secrets, breach of fiduciary duties, breach of contract and tortuous interference with contract as a result of officer forming a competing business. Litigation included emergency hearing for an order to preserve information after discovery of the wrongful destruction of computer information. As lead counsel, I developed our litigation strategy, conducted most of the deposition discovery and argued our emergency motion. I represented Crawford & Company.

Judge:	**The Honorable Alice Bonner**
Co-Counsel:	**Bradley A. Slutsky King & Spalding, LLP 191 Peachtree Street Atlanta, Georgia 30303 (404) 572-4600**
Opposing Counsel:	**William E. Clarke (Mr. Clarke has left private practice and his former firm does not have current contact information for him.)**

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

United States Attorney for the Northern District of Georgia. As the chief law enforcement officer in this district, I am responsible for prosecution of federal criminal violations in the district. I also am responsible for the defense of all civil actions filed against the United States and for representing the United States in civil actions filed by the government. I coordinate various federal and joint federal, state and local investigations, and advise the public of law enforcement issues that impact the citizens of the district. I have been significantly involved in redirecting the federal strategy for enforcement of the country's drug laws. As the individual responsible for the Southeast OCDETF Region, I have undertaken to promote inter-regional sharing of intelligence and development of inter-regional strategies to attack the national operations of drug traffickers. In the area of anti-terrorism, we have established and enlarged the Anti-Terrorism Advisory Councils, a joint task force with local, state and federal members, and directed the Joint Terrorism Task Force toward its operational role of investigating terrorism and terrorism-related criminal activity. We have developed and conducted significant training for local and state law enforcement officers on international and domestic terrorism topics and have engaged in a variety of outreach initiatives with the Arab and Islamic communities.

Whitewater Independent Counsel Investigation. Served as Deputy Independent Counsel responsible for the Arkansas phase of the investigations; supervised three aspects of the investigation, including the President's and Mrs. Clinton's investments in the Whitewater real estate development. (Appointed Deputy Independent Counsel)

United States v. Falkenberry. Prosecuted military member who raped a 10-year old child and threatened to murder her and her brother. (Lead prosecutor)

Legal Advisor to United States Military Training Mission in Saudi Arabia. Advised military commanders on in-country legal issues, including treaty obligations. (I was the only legal advisor to the Mission.)

Internal Investigation: E.F. Hutton. Conducted internal investigation to determine responsibility of corporate officers and directors for the conduct that gave rise to E.F. Hutton & Company, Inc.'s ("Hutton") plea of guilty to mail and wire fraud in connection with Hutton's banking practices. (Managed the investigation for Griffin B. Bell and authored investigation report.)

Internal Investigation: Exxon Valdez. Conducted internal investigation for Exxon's Outside Litigation Committee to determine the cause of the Exxon Valdez grounding and whether the officers and directors of Exxon were responsible for the grounding. (Co-manager of the investigation)

BellSouth Telecommunications Fraudulent Billing Practices Investigation. Represented BellSouth Telecommunications, Inc. ("BST") in a criminal investigation by the Florida Attorney General and by the Florida Statewide Prosecutor into alleged fraudulent sales by and billing practices of BST in Florida. (Lead counsel)

Fleet Finance Company Fraud Investigation. Represented Fleet Financial Group, Inc. in a Georgia Attorney General's investigation into alleged illegal lending practices. (Lead counsel)

Lincoln Savings & Loan. Represented an individual in a grand jury investigation of alleged bank fraud committed by Charles Keating and involving Lincoln Savings and Loan Association and others. (Co-counsel)

Commercial Espionage. Represented a multi-national company against allegations of commercial espionage and fraud in five different lawsuits. (Co-counsel)

Fraudulent Billing Investigation. Represented a multi-national company in a grand jury investigation of alleged fraudulent billing of clients in the insurance industry. (Lead defense counsel)

R.D. Donnelley v. BellSouth Advertising and Publishing Company, et al. Represented BellSouth operating and holding companies in an antitrust action in which it was alleged that BellSouth had a monopoly over telephone subscriber information. (Co-lead counsel)

Kennesaw State University Foundation. Represented this nonprofit entity in a Congressional investigation and IRS inquiry into whether the Foundation had engaged in impermissible activity in violation of its 501(c)(3) status. (Lead counsel)

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

In 2002, I agreed with my former law firm to a lump sum retirement plan payment, payable over 24 months. The last payment will be made on December 1, 2003.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

When a potential conflict is identified I will follow the guidelines of the Code of Judicial Conduct (28 U.S.C. §455). I also will consult with those at the Administrative Office of the Courts to evaluate whether a conflict exists and take appropriate action, including recusal, if a conflict is determined to exist. Having served as United States Attorney I am aware of the need to identify, address, and resolve potential conflicts and will exercise the same vigilance if confirmed as a district court judge.

If I am confirmed, there may be cases which are pending in my office which will present conflicts with my judicial duties. If so, I will take appropriate action to address and resolve any conflict identified.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

Please see attached Financial Disclosure Report dated November 10, 2003.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Please see attached Financial Net Worth Statement.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Bush-Cheney 2000 (Georgia Co-chair and Finance Committee Member)

Coverdell Good Government and Capital Trust Committee (Steering and Finance Committees) (1992 and 1998)

George Bush for President (Georgia Steering Committee)

Myrtle Davis for Mayor (Finance Committee) (1994)

Guy Millner for Governor (Provided consultation on legal and law enforcement issues) (1994)

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year 2002

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Duffey, Jr., William S	Northern District of Georgia	11/10/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) District Court - Nominee	5. ReportType (check appropriate type) (•) Nomination, Date 11/5/2003 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2002 to 10/31/2003
7. Chambers or Office Address Office of the U.S. Attorney 75 Spring St., SW, Suite 600 Atlanta, GA 30303	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☑ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	2002	Lump sum retirement from King & Spalding paid in 24 equal monthly installments from 01/01/02 to 12/01/03
2.		

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2003	Whitefield Academy honorarium paid to Whitefield Academy	$500
2.	2001	King & Spalding	$588,000
3.	2002-03	Gary Brewer and the Kentucky Ramblers	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Duffey, Jr., William S	11/10/2003

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
4.	2001-02	Holtzbrinck Publishing Holding, LP - Royalties from copyrights	
5.	2001-02	Simon & Shuster, Inc. - Royalties from copyrights	
6.	2001-03	Penquin Putnam, Inc. - Royalties from copyrights	
7.	2001-03	Random House, Inc. - Royalties from copyrights	
8.	2002-03	King & Spalding retirement payout	$539,000

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Duffey, Jr., William S	11/10/2003

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Duffey, Jr., William S	11/10/2003

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. Brokerage Account #1					Exempt				
2. Active Assets Fund	A	Dividend	K	T					
3. Blackrock Municipal Target Term Fund	A	Dividend	J	T					
4. Blackrock Ins. Muni Term Fund	A	Dividend	K	T					
5. Dreyfus Strategic Muni Bond Fund	A	Dividend	K	T					
6. DTF Tax Free Income Fund	A	Dividend	K	T					
7. Ishares DJ Basic Materials	A	Dividend	K	T					
8. Ishares DJ Consumer Noncyclical	A	Dividend	K	T					
9. Ishares DJ Healthcare	A	Dividend	L	T					
10. Ishares DJ Industrial	A	Dividend	L	T					
11. Ishares DJ Financial	B	Dividend	M	T					
12. Ishares DJ Consumer Cyclical	A	Dividend	K	T					
13. Lowes	A	Dividend	J	T					
14. Munienhanced Fund	A	Dividend	K	T					
15. Munivest Fund II, Inc.	A	Dividend	K	T					
16. Nuveen Premier Inc. Municipal Fund	A	Dividend	K	T					
17. Standard & Poors Midcap 400	A	Dividend	L	T					
18. Van Kampen Muni Trust SBI	A	Dividend	K	T					

1. Income/Gain Codes: (See Columns B1 and D4) A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: (See Columns C1 and D3) J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = $More than $50,000,000
3. Value Method Codes (See Column C2) Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market; U = Book Value; V = Other; W = Estimated

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Name of Person Reporting	Date of Report
Duffey, Jr., William S	11/10/2003

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
19. MS Value Added Market Service Equity Fund	A	Dividend	L	T	Exempt				
20. MS International Value Equity Fund	A	Dividend	M	T					
21. Morgan Stanley Managed Municipals Portfolio	A	Dividend	K	T					
22. Ishares MSCI Emerging Markets	A	Dividend	K	T					
23. Ishares MSCI EAFE Fund	A	Dividend	K	T					
24. Brokerage Account #2									
25. Active Assets Fund	A	Dividend	J	T					
26. Blackrock Ins. Muni Term Fund	A	Dividend	K	T					
27. Dreyfus Strategic Muni Fund	B	Dividend	K	T					
28. Munienhanced Fund	B	Dividend	K	T					
29. Munivest Fund II, Inc.	B	Dividend	K	T					
30. Van Kampen Muni Trust SBI	A	Dividend	K	T					
31. Van Kampen Emerging Market Fund	A	Dividend	L	T					
32. ING International Value B Fund	A	Dividend	K	T					
33. Van Kampen Equity Growth Fund	A	Dividend	L	T					
34. Franklin Mutual Shares Fund	A	Dividend	K	T					
35. Morgan Stanley Managed Municipals Portfolio	A	Dividend	K	T					
36. Ishares MSCI Japan Index Fund	A	Dividend	J	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

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Name of Person Reporting	Date of Report
Duffey, Jr., William S	11/10/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
37. IRA #1					Exempt				
38. Liquid Asset Fund	A	Dividend	J	T					
39. ✓ Government National Mortgage Assn. Pool 7.5%	A	Interest	J	T					
40. ✓ FHR Government Bond	A	Interest	J	T					
41. MS International Small Cap	A	Dividend	K	T					
42. MS Special Value Fund B	A	Dividend	K	T					
43. MS International Fund	A	Dividend	K	T					
44. Cohen & Steers REIT Trust	A	Dividend	K	T					
45. IRA #2 - Liquid Asset Fund	A	Dividend	J	T					
46. Ishares DJ Basic Materials	A	Dividend	K	T					
47. Ishares DJ Consumer Noncyclical	A	Dividend	K	T					
48. Ishares DJ Healthcare	A	Dividend	I	T					
49. Ishares DJ Industrial	A	Dividend	K	T					
50. Ishares DJ Financial	B	Dividend	M	T					
51. Ishares DJ Consumer Cyclical	A	Dividend	K	T					
52. Ishares S&P Global Energy	A	Dividend	K	T					
53. ✓ U.S. Treasury Zero Coupon, 5/07	A	Interest	J	T					
54. ✓ U.S. Treasury Note 4.75%, 11/08	A	Interest	J	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
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3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
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Name of Person Reporting	Date of Report
Duffey, Jr., William S	11/10/2003

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
55. U.S. Treasury Zero Coupon, 2/09	A	Interest	K	T	Exempt				
56. U.S. Treasury Note 6%, 8/09	A	Interest	K	T					
57. U.S. Treasury Bond Inflation Index, 3%	B	Interest	L	T					
58. FNMA Bond 3.25%, 11/07	A	Interest	K	T					
59. Federal Home Loan Mortgage Corp. 4.25%, 10/12	B	Interest	K	T					
60. Government National Mortgage Assn. 8%, 11/24	A	Interest	J	T					
61. MS Special Value Fund B Fund	A	Dividend	K	T					
62. Cohen & Steers REIT Trust	B	Dividend	L	T					
63. MS DW Spectrum Currency	A	Dividend	K	T					
64. MS DW Charter DWFCM LP	A	Dividend	K	T					
65. MS Charter Graham	A	Dividend	K	T					
66. Dean Witter Spectrum Select	A	Dividend	K	T					
67. MS Charter Campbell	A	Dividend	K	T					
68. Alliance World Dollar Government Fund II	A	Dividend	K	T					
69. ING Prime Rate Trust	A	Dividend	K	T					
70. MFS Intermediate Income Trust	A	Dividend	K	T					
71. Putnam Master Income Trust	A	Dividend	J	T					
72. MFS Multimarket Income Trust	A	Dividend	K	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
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Name of Person Reporting	Date of Report
Duffey, Jr., William S	11/10/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
73. IRA #3					Exempt				
74. Liquid Assets Fund	A	Dividend	J	T					
75. Brokerage Account #3									
76. Liquid Assets Fund	A	Dividend	J	T					
77. MS American Opportunities Fund	A	Dividend	K	T					
78. Van Kampen Select Growth Fund	A	Dividend	J	T					
79. Brokerage Account #4									
80. U.S. Government Money Market Trust	A	Dividend	J	T					
81. MS American Opportunities Fund	A	Dividend	K	T					
82. MS Equity Fund B Fund	A	Dividend	J	T					
83. Van Kampen Select Growth Fund	A	Dividend	J	T					
84. NW Mutual Extra Ordinary Life	A	Dividend	J	T					
85. NW Mutual Estate CompLife	B	Dividend	L	T					
86. NW Mutual 65 Life	C	Dividend	K	T					
87. C&B Capital, L.P.									
88. VCG, Inc.*	A	Dividend	J	T					
89. AppForge, Inc.*	A	Dividend	J	T					
90. Access Integrated Networks*	A	Dividend	J	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
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2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
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Name of Person Reporting	Date of Report
Duffey, Jr., William S	11/10/2003

VII. INVESTMENTS and TRUSTS -- income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
91. BSC Ventures*	A	Dividend	J	T	Exempt				
92. S.P.I. Dynamics*	A	Dividend	J	T					
93. nuBridges, LLC*	A	Dividend	J	T					
94. GMT Group, Inc.*	A	Dividend	J	T					
95. Global Care, Inc.*	A	Dividend	J	T					
96. Gevity, Inc.*	A	Dividend	J	T					
97. Payerpath , Inc.*	A	Dividend	J	T					
98. *Companies in which C&B Captial L.P. have invested									
99. Betsy Bryars, Inc.	A	Dividend	M	Q					
100. AppForge (preferred)	A	Dividend	K	T					
101. Gold Coins		None	J	T					
102. Post Properties	A	Dividend	J	T					
103. 1885 Fund, LLC	A	Dividend							
104. BellSouth	A	Dividend							
105. Coca-Cola	A	Dividend							
106. Intel	A	Dividend							
107. Oracle	A	Dividend							
108. Qwest	A	Dividend							

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
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3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
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Name of Person Reporting	Date of Report
Duffey, Jr., William S	11/10/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
109. Schering Plough	A	Dividend			Exempt				
110. Synovous Financial	A	Dividend							
111. Wachovia	A	Dividend							
112. Van Kempen Enterprises Fund	A	Dividend							
113. Van Kampen Equity Income Fund	A	Dividend							
114. Van Kampen Global Equity Fund	A	Dividend							
115. Savannah, GA Bond	B	Interest							
116. Atlanta, GA Water Bond	A	Interest							
117. Atlanta, GA Airport Bond	A	Interest							
118. Cobb County, GA Bond	A	Interest							
119. DeKalb County, GA Hospital Bond	A	Interest							
120. DeKalb County, GA School Bond	A	Interest							
121. Fayette County, GA School Bond	A	Interest							
122. Fulton County, GA Hospital Bond	A	Interest							
123. Fulton County, GA School Bond	A	Interest							
124. GA Municipal Electric Bond	A	Interest							
125. Macon, GA Hospital Bond	A	Interest							
126. MARTA Bond	A	Interest							

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT
Page 8 of 8

Name of Person Reporting	Date of Report
Duffey, Jr., William S	11/10/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
127. Aaron Rents	A	Dividend			Exempt				
128. AFLAC Inc.	A	Dividend							
129. Roper Industries	A	Dividend							
130. Nuveen Municipal Value Fund	A	Dividend							
131. Van Kampen Asian Equity Fund	A	Dividend							
132. Van Kampen Emerging Growth Fund	A	Dividend							
133. Fidelity Advisory Growth Opportunity Fund	A	Dividend							
134. MS Global Dividend Growth Fund	A	Dividend							
135. MS Flexible Income Trust Fund	A	Dividend							
136. GNMA Pool 7-1/2%, 7/07	A	Interest							
137. Aggressive Equity Fund B	A	Dividend							
138. GNMA Pool 8%	A	Interest							
139. Equity Fund C	A	Dividend							
140. Charles Schwab Money Market	A	Dividend							

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000		
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000			
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
	U = Book Value	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Duffey, Jr., William S	11/10/2003

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

(1) Accountant estimated value of spouse's interest in privately-held family corporation.

(2) All stock listed in Section VII is common stock unless otherwise indicated.

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Duffey, Jr., William S	11/10/2003

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature William S. Duffey Date November 10, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

Assets		Liabilities	
Cash on hand and in banks	7,000.00	Notes payable to banks (Secured)	0.00
U.S. Government Securities (See schedule)	180,394.00	Notes payable to banks (Unsecured)	0.00
Listed Securities (See schedule)	2,157,785.00	Notes payable to relatives	0.00
		Notes payable to others	0.00
Unlisted securities (See scheduled)	138,083.00	Accounts and bills due	
Accounts and notes receivable:		Unpaid income tax	0.00
Due from relatives and friends	0.00	Other unpaid income and interest	0.00
Due from others	0.00	Real estate mortgage payable (See schedule)	355,000.00
Doubtful	0.00		
Real estate owned (See schedule)	1,080,000.00	Chattel mortgages and other liens payable	0.00
Real estate mortgages receivable	0.00		
Autos and other personal property	256,000.00	Total liabilities	355,000.00
		Net worth	$3,562,285.00
	Total liabilities and net worth		$3,917,285.00

Cash value - life insurance	85,200.00
Other assets itemize:	
Gold coins	4,823.00
Total Assets	3,917,285.00

Contingent Liabilities	
As endorser, comaker or guarantor	0.00
On leases or contracts	0.00
Legal claims	0.00
Provision for federal income tax	0.00
Other special debt	0.00

General Information	
Are any assets pledged?	No
Are you defendant in any suits or legal actions?	No
Have you ever taken bankruptcy?	No

Listed Securities

William Simon Duffey, Jr.

Account No. 1	
Active Assets Fund	28,073.00
Blackrock Municipal Target Term Fund	14,182.00
Blackrock Ins. Muni Term Fund	41,256.00
DTF Tax Free Income fund	18,577.00
Dreyfus Strategic Muni Bond Fund	40,391.00
Ishares DJ Basic Materials	20,240.00
Ishares DJ Consumer Noncyclical	36,576.00
Ishares DJ Healthcare	74,662.00
Ishares DJ Industrial	54,120.00
Ishares DJ Financial	110,318.00
Ishares DJ Consumer Cyclical	38,017.00
Lowes	13,790.00
Munienhanced Fund	40,539.00
Munivest Fund II, Inc.	40,812.00
Nuveen Premier, Inc. Municipal Fund	18,616.00
Standard & Poors Midcap 400	65,325.00
Van Kampen Muni Trust	40,548.00
MS Value Added Market Service Equity Fund	63,316.00
MS International Value Equity Fund	112,676.00
Morgan Stanley Managed Municipals Portfolio	40,893.00
Ishares MSCI Emerging Markets	29,682.00
Ishares MSCI EAFE Fund	24,920.00
Account No. 2	
Active Assets Fund	1,180.00
Blackrock Ins. Muni Term Fund	15,426.00
Dreyfus Strategic Muni Fund	15,722.00
Munienhanced Fund	15,051.00
Munivest Fund II, Inc.	16,342.00
Van Kampen Muni Trust SBI	15,211.00
Van Kampen Emerging Markets Fund	67,028.00
ING International Value B Fund	20,620.00
Van Kampen Equity Growth Fund	55,631.00
Franklin Mutual Shares Fund	34,313.00
Morgan Stanley Managed Municipals Portfolio	15,638.00
Ishares MSCI Japan Index Fund	9,240.00

IRA #1	
Liquid Asset Fund	1,337.00
MS International Small Cap	44,994.00
MS Special Value Fund B	38,777.00
MS International Fund	29,402.00
Cohen & Steers Reit	28,731.00
IRA #2	
Liquid Asset Fund	6,180.00
Ishares DJ Basic Materials	24,288.00
Ishares DJ Consumer Noncyclical	27,432.00
Ishares DJ Healthcare	58,662.00
Ishares DJ Industrial	45,100.00
Ishares DJ Financial	101,832.00
Ishares DJ Consumer Cyclical	32,586.00
Ishares S&P Global Energy	45,891.00
MS Special Value Fund B	38,208.00
Cohen & Speers REIT Trust	86,475.00
MS DW Spectrum Currency	28,935.00
MS DW Charter DWFCM LP	30,750.00
MS Charter Graham	34,709.00
MSDW Spectrum Select	25,000.00
Alliance World Dollard Government Fund II	15,070.00
ING Prime Rate Trust	15,116.00
MFS Intermediate Income Trust	15,158.00
Putnam Master Income Trust	14,494.00
MFS Multi-market Income Trust	15,057.00
MS Charter Campbell	30,000.00
IRA#3	
Liquid Assets Fund	886.00
Account No. 3	
Liquid Assets Fund	3,119.00
MS American Opportunities Fund	16,760.00
Van Kampen Select Growth Fund	2,085.00
Account No. 4	
U.S. Government Money Market Trust	10,583.00
MS American Opportunities Fund	26,269.00
MS Equity Fund B	6,121.00
Van Kampen Select Growth Fund	2,085.00
Post Properties	6,780.00

U.S. Government Securities

William Simon Duffey, Jr.

Government National Mortgage Assn.	$ 1,894.00
U.S. Treasury Zero Coupon, 5/07	13,634.00
U.S. Treasury Note, 4.75%, 11/08	10,688.00
U.S. Treasury Zero Coupon, 2/09	16,650.00
U.S. Treasury Note, 6%, 8/09	28,266.00
U.S. Treasury Bond Inflation Index, 3%	56,192.00
FNMA Bond, 3.25%, 11/07	25,055.00
Federal Home Loan Mortgage Corp., 4.25%, 10/12	24,539.00
Government National Mortgage Assn., 8%, 11/24	2,276.00
FHR Government Bond	12,000.00

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

I have served in a number of pro bono activities. I have represented pro bono clients in a variety of cases: an INS criminal investigation; an elderly woman in a commitment proceeding, and a woman in a matter involving a sexual proposition by a mental health physician who was treating her. I coordinated the King & Spalding, LLP federal habeas corpus court-appointed counsel program. I have supervised and served as the responsible partner in approximately 10 pro bono cases. I conducted an internal investigation into allegations of racial discrimination for the Board of the Georgia Resources Institute (which represents indigent death row inmates). I have provided pro bono legal services to a wide variety of people in our church and my community separate and apart from any formal pro bono program.

I also have participated in a variety of other civic positions. I have served as Chair and am a founding Board member of the Georgia Wilderness Institutes which supports alternative incarceration programs for youth offenders. In 1995 I organized the Coverdell Leadership Institute. The Institute is a training program in the political system. Topics covered include developing public policy positions to ethics to political communication. I am a founder and officer of the New Century Club, a membership organization for Atlanta's emerging leaders which focuses on the development of relationships among leaders from diverse backgrounds. I was involved in instituting the Fulton County Courts Mandatory Non-binding Arbitration Program. I have served on the North Georgia Walk to Emmaus Board and as an Emmaus Walk retreat leader. I also have served as an elder in my church and was responsible for conducting the church's annual campaign. I instituted and conducted a writing program at a local inner-city public school and have built houses for Habitat for Humanity.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates

of membership. What you have done to try to change these policies?

No

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes. Yes.

On or about June 13, 2003, the Judicial Review Panel ("JRP") announced it would review the qualification of candidates interested in being considered for appointment to the anticipated vacancy on the District Court. On or about June 25, 2003, I requested a copy of the questionnaire the JRP requested be completed. I submitted my completed questionnaire to the JRP on July 21, 2003. On August 22, 2003, I was notified I was scheduled to be interviewed by the JRP, and on September 16, 2003, I was interviewed. On September 24, 2003, I was contacted by The White House Counsel's Office and advised I had been recommended for appointment to the District Court. On September 26, 2003, I was interviewed in Washington by representatives of The White House Counsel's Office and the Department of Justice. On October 8, 2003, I was notified by The White House Counsel's Office that the President requested me to provide additional information and to undergo a background check in connection with his continuing consideration of my nomination. I was nominated on November 5, 2003.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, acer question? If so, please explain fully.

No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The federal judiciary has a specific function under Article III of the United States Constitution. Specifically, it is charged with interpreting the Constitution and laws of the United States, cases between citizens of different states and those other grants of jurisdiction enumerated under the Constitution. The court performs this function when it is presented with real cases and controversies, and then only when the person bringing the case has standing to do so and the controversy is ripe, and not moot. In fulfilling the responsibility to hear cases and controversies, the court must observe applicable legal precedent and apply the doctrine of stare decisis. In short, the development of the federal judiciary provides contours within which the modern federal court must operate. These contours provide for consistency in the operation of the federal judiciary and promote fairness and justice. Policy making, problem solving, and oversight over institutions are functions delegated under the Constitution to the legislative and executive branches of government.

Senator CRAIG. Mr. Duffey, thank you, and thank your family for being here. I must tell you that a friend of Paul Coverdell's is, without question, a friend of mine.

Mr. DUFFEY. Thank you, Mr. Chairman.

Senator CRAIG. Now, let me turn to Lawrence Stengel.

Judge STENGEL. Stengel.

Senator CRAIG. Stengel, okay. I wrote down "Casey."

Judge STENGEL. Same pronunciation, no relation.

Senator CRAIG. All right, thank you very much. Would you please introduce your family?

STATEMENT OF LAWRENCE F. STENGEL, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge STENGEL. I would be glad to. Thank you, Senator. It is a privilege for me and for my family to be here. My wife, Theresa; my children, Tim, Emily, Peter, Julia, and the speaker of our house, Joseph, who is on the floor.

[The biographical information of Judge Stengel follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full Name (include any former names used).**

Lawrence Francis Stengel

2. **Address: List current place of residence and office address(es).**

Residence:
Lancaster, PA

Office:
Lancaster County Courthouse
50 North Duke Street
Lancaster, PA 17602

3. **Date and Place of Birth.**

August 7, 1952 - Lancaster, PA

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

I am married to Theresa Berger Stengel. My wife's maiden name was Theresa Marie Berger. Theresa is a nurse by profession; she is not currently employed outside of our home.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

University of Pittsburgh School of Law - 1977-1980 - J.D. awarded 1980

St. Joseph's College (now St. Joseph's University) - 1970-1974 - B.A. awarded 1974

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

Judge, Lancaster County Court of Common Pleas	October 1990 to Present
Adjunct Professor, Franklin & Marshall College	January 1997 to Present
Adjunct Professor, Millersville University	September 2000 to Present
Private Law Practice, Lancaster	January 1985 to Oct. 1990

Dickie, McCamey & Chilcote, PC, Pittsburgh	1980 to December 1984
Catholic Diocese of Pittsburgh (part-time employment as law clerk during law school)	May 1978 to August 1979
Lancaster Catholic High School Teacher, English and Social Studies	Sept. 1974 to June 1977

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

I have had no military service.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

President's Award - Pennsylvania Conference of State Trial Judges, Annual Meeting, July 2002. This award was given to me for my work on a judicial educational program involving racial disparity in the court system.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

Pennsylvania Supreme Court
Ad Hoc Committee on Motions Practice - Appointed May 2003

Pennsylvania Conference of State Trial Judges - 1990 to Present
Education Committee - 2001 to Present
The Education Committee consists of 12 judges who plan the educational programs for our 4-day conferences in July and February of each year. Membership on the Committee is by invitation. I consider it an honor to have been asked to join the Education Committee and I find the work of the Committee to be interesting and rewarding.

Commonwealth Partners Committee - 2000 to Present
As regional coordinator for this committee, I planned a meeting of central Pennsylvania judges and state legislators. I moderated the discussion of issues in this program involving an exchange between the legislators and judges in attendance.

Executive Committee - 1999 to Present
I was elected as a Zone Representative in June 1999 by my peers from seven central Pennsylvania counties and I continue to serve on the Executive Committee.

Court of Common Pleas of Lancaster County

Mentor for New Judges
I was appointed by our president judge in November 1999 to mentor new judges on our court.

Juvenile Court Task Force
I was appointed by our president judge to lead a task force composed of judges, lawyers and court personnel to study and improve our juvenile court system. The Juvenile Court Task Force proposed a number of changes in our juvenile court, each of which was implemented with very good results. I authored the report of the task force and I was involved in monitoring the progress of our juvenile court through the end of 2002.

Civil Court Task Force
I was appointed by our president judge to lead a task force composed of judges, lawyers and court personnel to study and improve the function of our civil court. The Civil Court Task Force proposed significant changes in our discovery motions practice, our pretrial motions practice and our management of complex cases. I worked with the task force in drafting six new local rules of civil procedure to effect these changes. In addition, I authored the report of the Civil Court Task Force. At present, I am involved in our Civil Rules Committee, which is revising all of our local rules of civil procedure.

American Bar Association - 1980 to 1990
ABA Leadership Conference, Chicago, Illinois, March 2001

Pennsylvania Bar Association - 1980 to Present
Chair, Lawyer Referral Committee - 1986 to 1990

Lancaster Bar Association - 1985 to Present
Diversity Task Force, 2003
President, 2002
Board of Directors, 2000 to Present
Chair, Nominating Committee, 1999 to 2001
Pro Bono Blue Ribbon Panel, 1996
Fee Arbitration Committee, 1987 to 1990

Allegheny County Bar Association - 1980 - 1984

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

I am not a member of any organization active in lobbying before public bodies.

I am a member of the Conestoga Country Club, Lancaster, PA.

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

At the time I became a judge, I was admitted to practice in the following courts:

United States Supreme Court, 1989
Third Circuit Court of Appeals, 1981
United States District Court for the Western District of Pennsylvania, 1980
United States District Court for the Eastern District of Pennsylvania, 1985
Supreme Court of Pennsylvania, 1980
Court of Common Pleas of Lancaster County, 1985
Court of Common Pleas of Allegheny County, 1980

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

I wrote the following articles for the Lancaster Bar Association's publication entitled, "In Brief." I have attached copies of all articles. **See Exhibit 1.**

a. "A Balanced Life" - President's Column, June 2002

b. "Above and Beyond the Call" - Third Quarter 2002

c. "Of Foundations, Diversity and Image" - President's Column, Third Quarter 2002

d. "There's More to the Story" - "From the Bench" Column, 2001 - This article was printed in the Lancaster *New Era* as an op-ed column.

e. "Tradition for Dinner, Fun for Dessert" - President's Column, First Quarter 2002

I authored (1) a Report of the Lancaster County Court of Common Pleas Juvenile Court Task Force - March 3, 2000, and (2) a Report of the Lancaster County Court of Common Pleas Civil Court Task Force - May 3, 2000.

I wrote a Comment in the University of Pittsburgh *Law Review* when I was a law student entitled, "School Financing in Pennsylvania: Judicial Response, Legislative Responsibility," 41 Univ. of Pittsburgh L.R. 715 (1980).

I have not given any speeches on issues involving constitutional law or legal policy. I have been the member of a number of panels in educational programs:

Panelist for the Pennsylvania Bar Institute program, "Trial of a Medical Malpractice Case," April 2003, in Mechanicsburg, Pennsylvania.

Course Planner for the Pennsylvania Conference of State Trial Judges Mid-Annual Meeting, February 2003. I planned and moderated a presentation entitled, "Some Evidentiary Potholes: How to Avoid Them or Get Out of Them (Maybe)." The presenter was Charles B. Gibbons, Esquire, of Klett, Rooney, Lieber & Schorling in Pittsburgh.

Course Planner for the Pennsylvania Conference of State Trial Judges Annual Meeting, July 2002. I planned and presented a three-hour session on Racial Disparity in Sentencing in Pennsylvania. The panel included a judge from the Third Circuit, the chief public defender of Philadelphia, the district attorney of Allegheny County and three professors. The program was highly rated by our judges at the conclusion of the Conference and was very interesting to me during the six months in the planning and preparation.

Panelist for the Lancaster Bar Association's "Meet Your Judges" program held December 2, 1999.

Keynote Speaker at Balanced and Restorative Justice Forum, November 1999. The program was designed for school superintendents, school principals, psychologists, police chiefs and community leaders and was sponsored by Lancaster Healthy Communities and the Lancaster County Office of Juvenile Probation.

Presenter/Panelist for CLE Program at the Lancaster Bar Association on "Media and the Law," held September 22, 1999.

Panelist in Pennsylvania Newspaper Association's program on "Media Law Issues," Harrisburg, Pennsylvania, January 1999. The presentation dealt with orders limiting publicity in a high profile case.

Panelist for the Lancaster Bar Association's "Meet Your Judges" panel discussion on "Judicial Independence" held April 30, 1997. The panel included a federal judge from the Eastern District of Pennsylvania, a Pennsylvania Superior Court judge and four members of our bench.

Speaker at the 1996 Annual Mid-Atlantic Conference to Prevent Child Abuse held November 21-22, 1996.

Keynote Speaker at a seminar entitled, "Truancy and the Juvenile Offender" presented by the Lancaster Youth Violence Council on November 20, 1996.

Speaker at the Safer School Series, presented on August 20, 1996, by the Lancaster Youth Violence Council to the school superintendents, police chiefs and district justices of Lancaster County.

Presenter for a Pennsylvania Bar Institute one-day seminar in Philadelphia on "How to Offer and Object to Trial Evidence" in 1995.

13. **Health: What is the present state of your health? List the date of your last physical examination.**

The present state of my health is excellent. I had my last physical examination in October 2003. I have been getting a physical every other year since 1992.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

I have been serving as a judge of the Court of Common Pleas of Lancaster County, Pennsylvania, since October 29, 1990. In July 1990, I was appointed to that position by Robert P. Casey, then Governor of Pennsylvania. Under Pennsylvania law, the governor has the option of appointing a judge if an opening exists at the trial or appellate court levels. I was appointed to fill the vacancy of Ronald L. Buckwalter, who left our bench to become a federal judge in the Eastern District of Pennsylvania. In 1991, I ran for a full 10-year term and was elected in November 1991. In 2001, I ran for retention and was retained for a second 10-year term.

The Lancaster County Court of Common Pleas is a trial court of general jurisdiction. I hear civil and criminal cases at this time. Earlier in my judicial career, I heard family cases and juvenile cases along with my civil and criminal trial court assignments.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

(1) Ten most significant opinions written:

Wal-Mart Stores, Inc. v. Zoning Hearing Board of Manor Township, No. CI-02-07242 (Lanc. Co. February 3, 2003), aff'd, No. 488 C.D. 2003 (Pa. Cmwlth. Oct. 2, 2003).

Rossi v. Commonwealth of Pennsylvania, Department of Transportation, Bureau of Driver Licensing, 78 Lanc. L.R. 598 (2001), aff'd, 798 A.2d 801 (Pa. Cmwlth. 2002), appeal granted, 815 A.2d 1044 (Pa. 2003).

Landau v. Sheaffer, 78 Lanc. L.R. 362 (2001).

Harsh v. Petroll, 78 Lanc. L.R. 336 (2000).

Basile v. Donegal Area School District, 78 Lanc. L.R. 398 (2000).

Commonwealth v. Lambert, 76 Lanc. L.R. 184 (1998), aff'd, 723 A.2d 684 (Pa. Super. 1998).

Commonwealth v. Lambert, 1998 WL 558749 (Lanc. Co. 1998), aff'd 723 A.2d 684 (Pa. Super. 2000), cert. denied, 532 U.S. 919 (2001).

Lititz Mutual Ins. Co. v. Steely, No. 1044-1997 (Lanc. Co., April 27,1998), rev'd, 746 A.2d 607 (Pa. Super. 1999), rev'd, 567 Pa. 98, 785 A.2d 975 (2001), rearg. denied, 2002 Pa. LEXIS 210 (Pa. Jan. 25, 2002).

Mantia v. Northern Insurance Company of New York, 76 Lanc. L.R. 250, 39 D.&C.4th 71 (1998).

Commonwealth v. May, Nos. 4223, 4954 of 2001; 2510-2002 (Lanc. Co. July 17, 2003)

See Exhibit 2.

(2)(a) Lower court decisions reversed:

1991:

Commonwealth v. Vargas, No. 1527-1990 (Lanc. Co. 1991).

Defendant was sentenced following convictions for possession of a controlled substance (cocaine) with intent to deliver, and for the criminal conspiracy attendant thereto. On appeal, the Superior Court held that I misapplied the legislative amendment to the sentencing provisions which mandated a seven year sentence where there had been a previous conviction for criminal conspiracy to deliver cocaine. The amendment, while in effect at the time of sentencing, was not in effect on the date the crime occurred. Therefore, it was error to invoke the mandatory minimum and the case was remanded for sentencing. The re-sentencing was affirmed by the Superior Court on appeal.

Commonwealth v. Forrest, No. 0119-1990 (Lanc. Co. 1991).

The Superior Court of Pennsylvania ruled that it was error for the trial court to admit into evidence a gun seized from appellant at the time of his arrest, which was approximately nine months after the commission of the bank robbery. The Court held that a significant period of time had elapsed between the commission of the crime and the period of possession, and the evidence was too remote and hence inadmissible. In addition to this temporal factor, the Court found that there was little in the record to convince the Court that the .357 Magnum was used in the bank robbery. As a result, the Superior Court held that the trial court erred in admitting the gun into evidence because the possession of the weapon was not reasonably proximate to the commission of the crime. The Commonwealth did not establish, beyond a reasonable doubt, that this error in admitting the gun was harmless. Therefore, the judgment of sentence was reversed and the case was remanded for a new trial.

Commonwealth v. Lopez, No. 3239-1990 (Lanc. Co. 1991).

In this criminal matter, the Superior Court held that the initial stop of appellant's vehicle was not supported by probable cause. Therefore, the fruits of the search, 9.1 grams of cocaine and 30 grams of marijuana, had to be suppressed.

Ford v. Zoning Hearing Board of Caernarvon Township, No. 616-1991 (Lanc. Co. 1991), rev'd 151 Pa. Cmwlth. 323, 616 A.2d 1089 (1992).

In this action, the landowner sought the removal of the conditions the zoning hearing board placed on the grant of a 1987 variance, specifically, the recording of deed restrictions to prevent his further subdivision of his land. The Commonwealth Court found that because the landowner established a subsequent substantial change in the circumstances incident to the land itself that made the 1987 deed restriction condition

inappropriate, the zoning hearing board and trial court erred in denying the landowner's request to remove the conditions. Thus, the trial court order was reversed and the court directed to modify the decision below so that the zoning variance conditions were removed.

1992:

Commonwealth v. Gable, No. 2858-1990 (Lanc. Co. 1992).

Gable entered a plea of guilty to the charge of corruption of minors in 1991. During his probationary period, Gable was charged with terroristic threats and recklessly endangering another person involving the use of a loaded weapon and threats made against a family member. After finding Gable to be in violation of his probation, I deferred sentencing pending an evaluation by Reading Specialists, a group of therapists specializing in the treatment of sexual offenders. The evaluation included Gable's character, developmental history, academic and vocational history, and employment history. The evaluation was ordered to determine whether this sexual offender was amenable to treatment or counseling in the community. On appeal, the Superior Court ruled that I erred in failing to place on the record my reasons for dispensing with a pre-sentence investigation by the probation department and that I failed to refer, at the time sentencing was imposed, to specific information regarding Gable's character. Therefore, the case was remanded for resentencing. A dissenting opinion was filed.

Commonwealth v. Wilson, No. 3220-1992 (Lanc. Co. 1992).

Defendant entered a negotiated guilty plea to charges of spousal sexual assault and other related charges. On appeal, the Superior Court determined that the trial court guilty plea colloquy was defective, and that the defendant was prejudiced by entering an unknowing guilty plea.

1993:

Weaver v. Erie Insurance Exchange, No. 3598-1991 (Lanc. Co. 1993).

This case addressed the question of what is "actual loss of gross income" under the Pennsylvania Motor Vehicle Financial Responsibility Law, 75 Pa. C.S.A. § 1701, et seq. In answering this question, I interpreted the MVFRL as requiring a coordination or complementary application of first party income loss benefits and worker's compensation benefits in determining actual wage loss for the insured. On appeal, the Superior Court reversed based upon a controlling case decided approximately six months after the trial court decision.

In re Appeal of Little Britain Township from the Decision of the Zoning Hearing Board of Little Britain Township, Lancaster County, Pennsylvania, Nos. 4277-1991, 4302-1991, 4874-1001 (Lanc. Co. 1993), rev'd 651 A.2d 606 (Pa. Cmwlth. 1994), appeal denied, 541 Pa. 645, 663 A.2d 696 (1995).

This zoning matter involved the use of land to process "spent mushroom compost" which is what is left from the growing of mushrooms. Following issuance of an enforcement notice which had the effect of prohibiting the final stages of the process, namely, the bagging and removal of the weathered compost, the land use continued. The Township filed an equity action to enjoin the activity and, on appeal, the Commonwealth Court held that the zoning ordinance had been violated by changing the use of the land without first obtaining a certificate of use and occupancy and that no variance on an estoppel or vested rights theory was warranted. On a subsequent appeal before this court, I determined that the Commonwealth Court order in the prior equity action was a final judgment on the merits and that the landowner was collaterally estopped from relitigating the issue of vested rights/variance by estoppel in the zoning proceeding. The Commonwealth Court found that this was error. Moreover, the Commonwealth Court determined that I erred in admitting additional evidence which constituted hearsay evidence and which was not subject to cross examination.

Commonwealth v. Wagner, Nos. 3898-1992, 283-1993 (Lanc. Co. 1993).

A former tax collector pled guilty to 62 counts of violating the local tax collection law and pled nolo contendere to 62 counts of committing theft by failure to make required disposition of funds received. On appeal, that portion of his sentence requiring incarceration, parole and probation, community service and payment of $22,239.36 to the defendant's bonding company were affirmed. However, the order of restitution in the amount of $26,971.87 was reversed. The Court ruled that Lancaster County's investigative costs and costs for an internal audit of county tax records were not costs flowing directly from the defendant's culpable conduct. Additionally, the borough's attorney's fees were determined not to be recoverable expenses.

Commonwealth v. Delgado, No. 2834-1991 (Lanc. Co. 1993).

The defendant was convicted of possession of cocaine, possession with intent to deliver, and tampering with or fabricating physical evidence. The Superior Court affirmed on the basis of my lower court opinion. The Supreme Court granted allowance of appeal in order to review the sufficiency of the evidence underlying this defendant's conviction for tampering with or fabricating evidence. The Supreme Court held that the act of discarding contraband in plain view of a pursuing officer fails to demonstrate the intent necessary to maintain a conviction for tampering with evidence. Rather than destroying or concealing evidence, the Court found that this defendant was simply abandoning the cocaine while being pursued by the police.

1994:

Fulkerson v. City of Lancaster, Nos. 2589-1990, 4439-1992 (Lanc. Co. 1994).

This case arose from an automobile collision involving a police pursuit. Two police cruisers were in pursuit of a motorcyclist. The first officer with the Manor Township Police Department passed the Fulkerson vehicle without incident. The second police car belonging to the City of Lancaster Police Department hit the shoulder of the road, crossed into the northbound lane of travel and collided with Fulkerson's vehicle. Manor Township filed a motion for summary judgment. I determined that material issues of fact existed as to whether the Manor Township officer's operation of his vehicle and his failure to suspend the police pursuit were a substantial factor in causing the automobile collision. On appeal, the Commonwealth Court held that there was no evidence to establish that the second officer relied on the first officer's conduct. Therefore, the Court held that the Fulkersons did not establish, as a matter of law, that a reasonable jury could find that the first officer's alleged negligence was the cause of their injuries. The order of the trial court was reversed, with one dissent.

Gentzler v. Atlee, No. 4950-1993 (Lanc. Co. 1994), rev'd 443 Pa. Super. 128, 660 A.2d 1378, appeal denied, 543 Pa. 694, 670 A.2d 142 (1995).

In sustaining the defendant's preliminary objections in the nature of a demurrer, I determined that the plaintiff physician had failed to state a cause of action for wrongful use of civil proceedings against a lawyer who, on behalf of an injured client, included the physician as a defendant in an underlying medical malpractice suit based on negligence and lack of informed consent. An action for wrongful use of civil proceedings will be upheld if the trier of fact can reasonably conclude that the defendant initiated the underlying lawsuit without probable cause. I decided as a matter of law that the defendant lawyer had the requisite probable cause in suing the plaintiff physician in the underlying action. On appeal, the Superior Court held that this was error since the plaintiff physician alleged that the defendant lawyer did not reasonably believe that the underlying medical malpractice claim was valid under the facts pleaded, and the action was not supported by the law.

Commonwealth v. Giorgio, No. 5583-1993 (Lanc. Co. 1994).

This case involved a 90-day suspension of operating privileges as a result of an underage drinking conviction. I sustained the statutory appeal on the basis that the driver was unaware that suspension of his operating privilege would result from a conviction of underage drinking. I relied upon the case of Duffey v. Department of Transportation, Bureau of Driver Licensing, 147 Pa. Cmwlth. 280, 607 A.2d 815 (1992), which held that there was an obligation to inform the motorist of the 90-day license suspension for underage drinking because it was part of the criminal penalty the same as a monetary fine and not a collateral civil consequence of the criminal conviction. I was unaware, however, that approximately six weeks before the hearing in this matter, the Supreme Court reversed the Duffey case and held that operating privilege

suspensions as a result of a conviction for a criminal violation are collateral civil consequences of that conviction and there is no obligation to inform the motorist of the attendant suspension. Therefore, the case was reversed.

Commonwealth v. Runcel, No. 5763-1993 (Lanc. Co. 1994).

This case involved a six-month suspension of operating privileges as a result of a drug conviction. I sustained the statutory appeal on the basis that the defendant had not been informed at the time his guilty plea was accepted that a license suspension would occur. In making this decision, I relied upon two Commonwealth Court decisions which were reversed by the Supreme Court of Pennsylvania subsequent to my decision. I was aware of a Supreme Court decision, Plowman v. Department of Transportation, Bureau of Driver Licensing, 535 pa. 314, 635 A.2d 124 (1993), which impacted this case, however, it had been decided after the defendant had entered his guilty plea. On appeal, the Commonwealth Court held that under the principles of statutory construction, the Supreme Court's interpretation of a statute is considered to have been the law from its enactment date, despite contrary intervening holdings, and the latest interpretation is applicable to a case whose appeal has not yet been decided. Accordingly, Plowman was applicable and my decision was reversed.

In the Interest of Kimani Jaja Dixon, No. J609-1992 (Lanc. Co. 1994), rev'd 440 Pa. Super. 23, 654 A.2d 1179 (1995).

In this juvenile matter, the Honorable D. Richard Eckman conducted an adjudication hearing at the conclusion of which the juvenile was found to have committed acts, which if performed by an adult, would have constituted the offenses of aggravated assault and reckless endangerment of another person. Subsequently, I held the dispositional hearing and committed the juvenile to a secure facility. On appeal, the Superior Court ruled that Judge Eckman erred by disallowing the juvenile's cross-examination of the shooting victim regarding pending criminal charges. The Court held that these charges were relevant to show that the witness's testimony may have been biased by an expectation of favorable treatment from the Commonwealth if he testified against the juvenile.

Lehmier v. Crandall-Thorley Ltd., No. 4585-1992 (Lanc. Co. 1994).

This case involved the chain of distribution rights for a water softening product known as the scale watcher electronic descaler. This matter was before me on a petition for contempt based on the violation of a permanent injunction, which I granted. On appeal, the Superior Court held that although I properly found that appellants had violated the injunction, I construed the injunction too broadly by including sales which were not made in contravention of the injunction. Therefore, the case was remanded for a reassessment of damages.

1995:

Scantling v. Pennsylvania Department of Transportation, No. 4169-1994 (Lanc. Co. 1995).

In this license suspension case, I ruled that the revocation notice contained a material defect rendering the notice void. On appeal, the Commonwealth Court reversed based upon a recent 1995 decision of the Supreme Court of Pennsylvania which held that where PennDOT's error is technical in nature and not material to the defendant's understanding of the charges before him, a defective notice is not void.

Rottmund v. Lyons, No. 3887-1993 (Lanc. Co. 1995).

This was a personal injury case brought by a student at a vocational technical school for injuries to his hand and fingers. The school and teacher filed a motion for judgment on the pleadings. In response, the student filed a petition to amend the complaint. I dismissed the petition to amend based upon my determination that no exception to governmental immunity was applicable. On appeal, the Commonwealth Court held that I had insufficient facts to make this determination and thus abused my discretion in denying the petition to amend the complaint.

Commonwealth v. Riser, No. 0565-1995 (Lanc. Co. 1995).

In this criminal matter, the Superior Court ruled that a search of a bus passenger's bag and person was not voluntary. After requesting the search, the passenger was advised that while he was not required to consent, the officer would detain him while a search warrant was obtained. The passenger then consented and drugs were found. On appeal, the Superior Court held that given the choice, consent or be held until a warrant is obtained, there was no true choice. Therefore, the search was not voluntarily consented to, and the evidence seized should have been suppressed.

1996:

Bocchicchio v. General Public Utilities Corp., No. 2766-1995 (Lanc. Co. 1996), 456 Pa. Super. 23, 689 A.2d 305 (1997), aff'd on appeal after remand, 737 A.2d 801 (Pa. Super.), appeal denied, 560 Pa. 694, 743 A.2d 912 (1999).

In this breach of contract action, in the interest of judicial economy, I addressed a statute of frauds issue and sustained preliminary objections to the complaint based upon that defense. On appeal, the Superior Court held that Pa. R.Civ.P. 1028(a) required that the defense of the statute of frauds be asserted *only* in a responsive pleading as new matter rather than by preliminary objections. I was reversed because the court ruled that I had abused my discretion in not requiring the defendant to comply strictly with our procedural rules.

1997:

Commonwealth v. Currier, No. 2763-1991 (Lanc. Co. 1997).

In this criminal matter, I denied the defendant relief under the provisions of 61 Pa. C.S.A. § 61, which allows a modification of sentence or removal from prison and/or transfer to a hospital for treatment because of serious illness. Mr. Currier had contracted the HIV virus prior to the charges being filed in this case. In his petition to the court, he requested his immediate release from prison so he could seek better medical care in California and participate in clinical trials of experimental AIDS drugs within or outside the United States. I determined that § 61 did not apply to this defendant because he was "seriously ill" prior to going to prison and, therefore, I lacked jurisdiction to consider the defendant's request. I also noted that the defendant's concerns would be more appropriately addressed to the State Board of Probation and Parole or to the administration of the specific institution in which the defendant was incarcerated. On appeal, the Superior Court determined that § 61 was applicable given the fact that the defendant's was currently "seriously ill" and that his condition had deteriorated from the time he was sentenced. Therefore, jurisdiction did rest with the trial court and the matter was remanded.

Monchik v. Gochnauer, Nos. 3550-1995, 5781-1995 (Lanc. Co. 1997).

This matter involved actions for partition and replevin. The parties resided together for seven years in a home which they purchased jointly. The plaintiff sought credit for the fair market value of the real estate for the period that the defendant was the sole occupant of the home after the plaintiff moved out. I found that the plaintiff could not be awarded the fair market value because he retained his keys and garage door opener and, therefore, the defendant's possession of the property was not exclusive under the pertinent statute. On appeal, the Superior Court ruled that although the plaintiff may have retained keys to the premises, he did not interfere with the defendant's occupation of the property or her daily decisions regarding the repair and maintenance of the residence. As the defendant acted as the sole owner, the plaintiff was entitled to one-half of the fair market value of the property. The lower court decision was reversed only as to this issue and affirmed in all other respects.

East Lampeter Township v. King, No. 2570-1995 (Lanc. Co. 1997).

In this zoning matter I entered a final order permanently enjoining the Kings from engaging in commercial activities on their residential property. On appeal, the Commonwealth Court held that my award of costs and attorney fees was not warranted because I failed to make findings or conclusions that the Kings' conduct during the instant enforcement proceedings were dilatory, obdurate or vexatious as required by statute, but rather relied on various occasions where the Kings were adjudicated to be in contempt of court orders related to their commercial activities. Thus, the final decree was reversed as to the award of costs and attorney fees and fines owing on a 1991 judgment but affirmed in all other respects.

1998:

Commonwealth v. Harris, No. 1234-1996 (Lanc. Co. 1998).

In this criminal matter, the defendant and his co-defendant accosted at gunpoint, pistol-whipped, and robbed a young newlywed couple, forcing them out of their car in front of their new home. In Pennsylvania, the deadly weapon enhancement applies whenever the sentencing judge determines that the defendant possessed a deadly weapon during the commission of a crime. Possession is defined as "on the defendant's person or within his immediate physical control." Harris did not have a gun "on his person," rather his co-defendant did. However, I ruled that because Harris was always within inches of the gun and because Harris directed the use of the gun by instructing his accomplice to pistol-whip the victim, Harris had use of a deadly weapon in order to commit these crimes. On appeal, although noting that Harris demonstrated an exercise of control over his accomplice's use of the weapon, the Superior Court determined that the gun was not within Harris's immediate physical control and, therefore, I erred in applying the deadly weapon enhancement on the robbery conviction.

Lititz Mutual Ins. Co. v. Steely, No. 1044-1997 (Lanc. Co. 1998), rev'd, 746 A.2d 607 (Pa. Super. 1999), rev'd, 567 Pa. 98, 785 A.2d 975 (2001), rearg. denied, 2002 Pa. LEXIS 210 (Pa. Jan. 25, 2002).

In this insurance coverage dispute, I determined that the "pollution" exclusion in a general liability insurance policy did not preclude coverage for injuries allegedly caused by the ingestion and/or inhalation of lead-based paint. The Superior Court reversed, holding that the pollution exclusion in the insurance policy unambiguously applied to cases of lead poisoning from ingestion or inhalation of lead-based paint in residential settings. On appeal, the Supreme Court of Pennsylvania reversed the Superior Court, thus, affirming the trial court decision. See Lititz Mutual Insurance Co. v. Steely, 567 Pa. 98, 785 A.2d 975 (2001).

Appeal of Dillion Real Estate, No. 07470-1997 (Lanc. Co. 1998).

In this zoning matter, the court considered the issue of whether a borough council had any authority or discretion to refuse to permit a proposed land development once approval for the same is granted by the borough planning commission. I found that by reason of the complete delegation to the planning commission to determine zoning matters, the borough council had no such authority by statute or ordinance. On appeal, the Commonwealth Court held that, although the borough council was not authorized to make any decisions on applications for proposed land development, because the planning commission conditioned approval of the land development plan upon the approval of borough council of three conditions, these conditions operated as a limited grant of power in this particular case.

1999: No reversals.

2000:

In the Interest of J.A.S., a juvenile, No. J166-1999 (Lanc. Co. 2000).

The juvenile in this matter was adjudicated delinquent on charges of homicide by vehicle, driving a vehicle at a safe speed, meeting vehicle proceeding in opposite direction, and driving on roadways laned for traffic. On appeal, the first three adjudications were affirmed. The adjudication for driving on roadways laned for traffic was reversed because one element of this offense is that the roadway must have marked lanes. Because the evidence established that the roadway in question did not have marked lanes, the juvenile could not have committed the offense.

Cassell v. Gingrich, No. CI-00-02761 (Lanc. Co. 2000).

In this wrongful use of civil proceedings action, I took judicial notice of the record created in the underlying litigation, over which I presided, and determined that the underlying civil proceedings did not terminate in favor of the plaintiff. Additionally, I found that the defendants acted with probable cause in the institution of the underlying litigation, also based upon judicial notice of that record. Therefore, I sustained the preliminary objections filed by the defendants. On appeal, the Superior Court reversed my order based upon the erroneous use of judicial notice.

2001:

Commonwealth v. Vargas, No. 1569-1996 (Lanc. Co. 2001).

This criminal defendant filed a pro se "petition to correct illegal sentence" and I denied relief on the basis that I lacked jurisdiction to alter a sentence four years after it had been imposed. On appeal, the Superior Court held that such a petition should be treated as a Post Conviction Relief Act petition and as it was this defendant's first petition, he was entitled to the appointment of counsel even though the petition was apparently untimely.

Sweigert v. Zoning Hearing Board of Denver Borough, No. CI-01-03160 (Lanc. Co. 2001).

This zoning matter involved the issuance of an enforcement notice for five violations of the zoning ordinance relative to maintaining a junkyard or dump on a residential property. On appeal, the enforcement notice was affirmed as to three violations of the ordinance and reversed as to two violations.

2002:

Commonwealth v. Rineer, No. S0235-2001 (Lanc. Co. 2002).

This defendant was charged with the summary offense of disorderly conduct. Based upon the evidence, I determined that the interaction between the police and this defendant constituted an investigative stop. On appeal, the Superior Court found that the circumstances established only a mere encounter. As such, in the absence of a reasonable, articulable suspicion, the Superior Court determined that it was impermissible for the officer to further the encounter by conducting an investigative detention.

Reich v. Northwest Savings Bank, No. 2026-1997 (Lanc. Co. 2002).

In this matter I awarded compensatory damages and damages pursuant to the Pennsylvania Unfair Trade Practices and Consumer Protection Law based upon a loan for home renovation and new construction. On appeal, the Superior Court held that damages were not properly calculated and remanded for recalculation. The Supreme Court of Pennsylvania has granted the plaintiff's petition for allowance of appeal on July 14, 2003, and the matter is pending before the Supreme Court.

Elder v. Pennsylvania Department of Transportation, No. CI-01-00902 (Lanc. Co. 2002).

In this matter, I denied the plaintiffs' request for a declaration of de facto taking under the Eminent Domain Code. The property in question, purchased by the plaintiffs in 1996, was subject to a 1961 right-of-way for highway purposes. Road work in this right-of-way by PennDOT in 1999 and 2000 caused problems to the home's septic system which was located within the right-of-way. While recognizing that PennDOT's excavation work substantially impaired the septic and water systems on the property, I found that PennDOT was doing work within the legal right-of-way obtained by the government in 1961. I further found that the taking in this case had occurred in 1961 and that the then-property owner was compensated for the condemnation of the front portion of the property. Therefore, I held that the plaintiffs were without a remedy in the form of a new declaration of condemnation. On appeal, the Commonwealth Court held, alternatively, that the excavation for and creation of a new lane of travel alongside the existing road constituted a change of grade within the meaning of the Eminent Domain Code and, thus, entitled the homeowners to consequential damages. The case, therefore, was remanded for a determination of damages.

2003:

Commonwealth v. Lofton, Nos. 3106-2000 and 1870-2001 (Lanc. Co. 2001).

Lofton was convicted of aggravated assault and recklessly endangering another person following a jury trial. On June 3, 2000, defendant punched an elderly man on a street corner in the City of Lancaster. This was an unprovoked attack. The victim's nephew, "D" McClain, confronted Lofton and his friend, the argument escalated, and defendant left the area. Two days later, Lofton and his friend opened fire on McClain, who was standing across the street from a city elementary school. McClain returned fire. A teacher who was sitting in her vehicle at a stop sign observed defendant shooting in her direction. I excluded evidence which was offered to show that the victim had a criminal conviction for a violent offense and had been known to act in a violent way in an incident which did not lead to criminal charges. This evidence was offered in support of a justification defense, despite the fact that the victim of the shooting (and the alleged aggressor) was holding a Tastycake pie and a drink after emerging from a corner grocery store. One of these incidents offered by defense counsel occurred after the shooting in question. The other involved conduct of which the defendant was unaware. My ruling was based on the fact that the defendant could not have been acting in self-defense on the basis of known dangerous propensities of the victim because he did not know of the dangerous propensities at the time of the shooting.

A three judge panel of the Superior Court of Pennsylvania disagreed with me and ruled that the evidence of a violent character should have been admitted.

I should note that the first time the Superior Court considered this case, an unpublished memorandum dated July 17, 2003, I was affirmed. Panel reconsideration was granted and this recent opinion was issued.

1990-2003 Total No. of Opinions Written:	498
1990-2003 No. of Opinions Affirmed	181
1990-2003 No. of Opinions Reversed	34
Pending Appeals:	15

See Exhibit 3.

(2)(b) Cases in which appellate court affirmed with criticism:

Commonwealth v. Petroll, No. 2616-1995 (Lanc. Co. 1996), aff'd, No. 02429 Philadelphia 1996 (Pa. Super. June 18, 1997).

The Superior Court ruled that I erred by refusing to suppress the commercial driver's log book and related documents in this homicide by vehicle case. However, the Court found this to be harmless error and affirmed the judgment of sentence. **See Exhibit 4.**

(3) Significant cases in which federal or state constitutional issues addressed:

Most serious criminal cases are appealed to the Superior Court of Pennsylvania. These cases generally involve Fourth and Fifth Amendment issues. While I have written an extensive number of opinions, the most significant opinion to address federal constitutional issues is Commonwealth v. Lambert, 1998 WL 558749 (Lanc. Co. 1998).

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

I have held no public office other than my current position.

17. **Legal Career:**

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:

(a) federal courts;
(b) state courts of record;
(c) other courts.

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

5. What percentage of these trials was:
(a) jury;
(b) non-jury.

Upon my graduation from law school, I was hired as an associate attorney at Dickie, McCamey & Chilcote, PC, 2 PPG Place, Pittsburgh, Pennsylvania 15222. Dickie, McCamey & Chilcote was, at the time, primarily a civil litigation firm with much of its practice deriving from insurance defense work. When I joined the firm in 1980, their practice was branching out into a wider range of civil litigation and general practice.

I worked at Dickie, McCamey & Chilcote until December 31, 1984, when I moved to Lancaster, Pennsylvania, to open a private practice. On January 2, 1985, I opened a private practice in the law offices of my father, Lawrence E. Stengel, Esquire, at 53 North Duke Street, Lancaster, PA 17602. My father and I did not enter into a partnership because I was focusing on civil litigation matters and he had a real estate and estates and trust practice. In November 1987, we moved into 24 North Lime Street, Lancaster, PA 17602. I practiced at that location until October 1990, when I left the practice of law to become a judge.

The general character of my law practice was civil litigation, mostly on the defense side. At Dickie, McCamey & Chilcote I practiced almost exclusively in the area of civil litigation with some domestic or family cases on occasion. These were cases referred to me by partners in the law firm. I tried cases in several counties in Western Pennsylvania and handled matters in the federal court in the Western District of Pennsylvania as well.

When I moved my practice to Lancaster County, I continued to represent several insurance companies and defended their insureds in Lancaster, York, Dauphin, Cumberland and Lebanon Counties. I also took on a number of general civil litigation matters which generally were filed in the Court of Common Pleas of Lancaster County or in federal court in the Middle District or Eastern District of Pennsylvania.

My practice broadened somewhat in Lancaster because I took on general legal matters in addition to my litigation work.

I appeared in court frequently because my practice involved the arbitration or trial of civil cases and litigation of motions related to those cases. The percentage of those was: (a) federal court - 10%; (b) state courts of record - 85% ; and (c) other courts (district justices, magistrates) - 5%.

By percentage, my litigation caseload was approximately 95% civil and 5% criminal.

My best estimate and recollection would be that I tried approximately 20 jury trials and approximately 20 non-jury trials to verdict. I also tried in excess of 150 cases in court of common pleas arbitration in that time period. Also in that time period, I probably began 10-15 trials which settled. To the best of my recollection, I was sole or lead counsel in every case I tried.

The percentage of these trials was approximately 50% jury and 50% non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

The significant litigated matters which I personally handled during my law practice are listed below. Because of the length of time which has passed since I was in practice, I have been unable to find the docket numbers for these cases.

1. Heistercamp, et al v. Lomas & Nettleton Co., United States District Court for the Eastern District of Pennsylvania

I began representation of the defendant, Lomas & Nettleton, in this case in 1985. Lomas & Nettleton was a large mortgage broker at that time. The suit involved a breach of a loan commitment for a commercial real estate project. The plaintiffs were investors in a new outpatient surgery center. They asserted RICO and fraud claims as well. The case proceeded to trial in the United States District Court for the Eastern District of Pennsylvania before Judge Daniel Huyett in January 1987.

I was assisted in this case by David B. Fawcett, Esquire, of Dickie, McCamey & Chilcote, PC, 2 PPG Place, 4th Avenue, Pittsburgh, PA 15222-5402. (412) 392-5223.

Plaintiffs were represented by Joseph F. Roda, Esquire, 801 Estelle Drive, Lancaster, PA 17601. (717) 892-3000.

2: Knafel v. Jim McKain Ford, Court of Common Pleas of Allegheny County

In 1983 and 1984, I represented Jim McKain Ford, a family-owned automobile dealership in Allegheny County in a suit brought by a minority shareholder.

I was supervised in the handling of this litigation by Thomas P. Lutz, Esquire, of Dickie, McCamey & Chilcote, PC, 2 PPG Place, 4th Avenue, Pittsburgh, PA 15222-5402. (412) 392-5236. I also worked under the supervision of David B. Fawcett, Esquire. His address and phone number is listed above.

Plaintiff's counsel was Michael Plummer of Kirkpatrick, Lockhart in Pittsburgh. Mr. Plummer currently practices at 2800 Gulf Tower, 707 Grant Street, Pittsburgh, PA 15219. (412) 566-1600.

3: Thomas v. Motter Printing Press, Court of Common Pleas of Lancaster County

I was representing Motter Printing Press in this product liability case at the time I went on the bench in 1990. The defendant, Motter Printing Press, manufactured a press used at Donnelley Printing, where the plaintiff was employed. The plaintiff was loading a roll of paper on the press when a large roll of paper broke loose, fell onto the plaintiff and amputated his leg and crushed his pelvis. This was a substantial product liability case with many depositions and much written discovery.

Plaintiff was represented by Kent D. Mikus, Mikus Law Associates, 408 West Chestnut Street, Lancaster, PA 17603-3406. (717) 299-4575.

4: Gerhart v. Metropolitan Ins. Co. and Roth, Court of Common Pleas of Lancaster County

I represented William Gerhart, who was suing his health care insurance carrier and its representative for unpaid bills arising out of the death of his wife. His wife died of cancer and the insurance carrier refused payment of her hospital bills. This case was settled before trial.

Defendant was represented by William E. Haggerty, Esquire, who was at the time with the firm of Morgan, Hallgren, Crosswell & Kane. Mr. Haggerty now practices at 240 North Duke Street, Lancaster, PA 17602. (717) 397-3200.

5: Trauger v. Levin, M.D., Court of Common Pleas of Lancaster County

This was a medical malpractice action where I represented Mrs. Trauger in her suit against a plastic surgeon. Dr. Levin performed a release of the fascia in Mrs. Trauger's hand. The fingers in her hand had been constricting because of a condition known as dupeytrans contracture. This case settled before trial.

Defendant was represented by Christopher W. Mattson, Esquire, Barley Snyder Senft & Cohen, 126 East King Street, Lancaster, PA 17602-3126. (717) 299-5201.

6: Commonwealth v. Myers, Court of Common Pleas of Lancaster County

I tried this case to verdict, representing the defendant, Jacklin Myers. The defendant was convicted of aggravated assault and recklessly endangering another person for an assault on his wife.

The case was tried before the Honorable Wilson Bucher, who is now retired but resides at 1000 Locust Street, Columbia, PA, 17512. (717)684-6650.

The assistant district attorney prosecuting the case was Joseph C. Madenspacher, who later became the district attorney of Lancaster County. He now sits as a judge in the Court of Common Pleas of Lancaster County. Judge Madenspacher's telephone number is (717) 209-3131.

7: Davidson v. Mauer, Court of Common Pleas of Lancaster County

This was a civil action brought by Mr. and Mrs. Davidson against Walter Mauer, my client, arising out a business dispute. There was a non-jury trial involving the enforcement of an injunction held before Judge Louis Farina of the Court of Common Pleas of Lancaster County. Judge Farina's telephone number is 717-295-3525.

The Davidsons were represented by Michael H. Ranck, Esquire, 101 East Chestnut Street, Lancaster, PA 17602. (717) 299-6331.

8: Tappany v. Tappany, Court of Common Pleas of Lancaster County

I represented Donald Tappany, now deceased, in a complex divorce action in the late 1980's. The hearing on the divorce, equitable distribution and alimony issues was held before a divorce master, John M. Smith, Esquire, 222 South Market Street, Elizabethtown, PA 17002. (717) 367-1370.

Mrs. Tappany was represented by Gary G. Krafft, Esquire, 930 Red Rose Court, Lancaster, PA 17601. (717) 293-9293.

9: Lumsden v. Madenford, Court of Common Pleas of Lancaster County

Mr. Madenford was a sales representative for the Lumsden Corporation, who left its employment and began working for a competitor. The Lumsden Corporation brought an action to enforce a covenant not to compete.

Counsel for the Lumsden Corporation was John W. Tryon, Esquire, of Stevens & Lee, 25 North Queen Street, Lancaster, PA 17603. (717) 291-1031.

10: In Re: Benjamin Blei, Court of Common Pleas of Lancaster County

This was a dependency proceeding before the Orphans' Court. From 1986 through 1990, I served as a court appointed guardian ad litem for many children who were the subject of dependency proceedings in our court. Usually, these children were removed from abusive or neglectful situations and were involved in several court hearings a year during this process. This case is representative of those proceedings.

Counsel for the Children & Youth Agency was David E. Alspach, Esquire, 32 North Duke Street, Lancaster, PA 17602. (717) 393-3939.

19. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

a. Supreme Court of Pennsylvania Ad Hoc Motions/Rules Committee

I was appointed by Madame Justice Sandra Schultz Newman of the Pennsylvania Supreme Court to serve on a committee to consider a new set of rules governing motions practice in civil cases in Pennsylvania. This committee was chaired by Judge R. Stanton Wettick of the Court of Common Pleas of Allegheny County.

We reviewed and revised a new set of Pennsylvania rules and civil procedure governing motions practice in courts of common pleas.

b. Lancaster County Court of Common Pleas Civil Court Task Force

I was appointed by our president judge to lead a task force composed of judges, lawyers and court personnel to study and improve the function of our civil court. The Civil Court Task Force proposed significant changes in our discovery motions practice, our pretrial motions practice and our management of complex cases. I worked with the task force in drafting six new local rules of civil procedure to effect these changes. In addition, I authored the report of the Civil Court Task Force. At present I am involved in our Civil Rules Committee, which is revising all of our local rules of civil procedure.

c. Lancaster County Court of Common Pleas Juvenile Court Task Force

I was appointed by our president judge to lead a task force composed of judges, lawyers and court personnel to study and improve our juvenile court system. The Juvenile Court Task Force proposed a number of changes in our juvenile court, each of which was implemented with very good results. I authored the report of the task force and I was involved in monitoring the progress of our juvenile court through the end of 2002.

d. Lancaster County Court of Common Pleas Discovery Motions Court

As part of the work of the Civil Court Task Force, we decided to implement a new discovery motions rule and to create a regular session of court to address discovery motions exclusively. I drafted the rule, now in use as Local Rule 37: Discovery Motions. I conduct a session of court on alternating Fridays where I hear arguments and make rulings on discovery motions. These motions involve motions to compel responses to discovery, motions raising matters of privilege, motions for sanctions, etc. This new rule and this session of court was a significant change in our local practice and has been met with great approval by attorneys handling civil cases in Lancaster County. We have streamlined the process involving discovery motions. I dispose of approximately 40 motions each month.

e. Lancaster Bar Association

During my term as president of the Lancaster Bar Association in 2002, I formed a Diversity Task Force to consider ways to increase the number of minority attorneys practicing in Lancaster County and to assist those attorneys currently providing legal services to our minority communities. I appointed Osvaldo Espinosa, Esquire, to chair this task force and I have been a member of the task force since its creation last year. Mr. Espinosa practices at 33 East Orange Street, Lancaster, PA 17692. (717) 293-1400.

The task force is currently very busy and I believe this was a successful step that will continue to be successful in the years to come. We are providing translations of bar association brochures for Lancaster's Spanish-speaking population, we are conducting programs in a local high school and local college to identify and encourage minority students who may consider careers in the law, and we are providing Spanish-speaking lawyers for call-in shows on the local Spanish radio. While each of these steps is modest, they are being pursued with great enthusiasm and I believe this is a project of our bar association which will continue to be important to our bar and our community.

I also appointed a committee for the creation of a Lancaster Bar Association Foundation. Forming a foundation had been talked about for several years but no action had been taken. During my term as president, the foundation was incorporated and registered. The purpose of this foundation is to raise funds to be used for enhancing the delivery of services to underprivileged clients. A secondary purpose would be to fund educational programs.

The need for this foundation arose out of our concern that the local legal services office, MidPenn Legal Services, was not receiving adequate funding and support from the regional office. Lancaster has the largest population of indigent clients in central Pennsylvania and we felt the foundation would be a forward thinking step for addressing the needs of this population in the next ten years.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

I am eligible to receive pension benefits from the Pennsylvania State Employee Retirement System.

I have no anticipated receipts from deferred income, stock, options, uncompleted contracts or future benefits which I expect to derive from pervious business relationships or other sources.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

I am not aware of any litigation categories or financial arrangements that are likely to present potential conflicts of interest. Should a conflict arise, I will follow the guidelines set forth in 28 U.S.C. § 455 to avoid any impropriety or appearance of impropriety.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

I may continue to teach on occasion at Franklin & Marshall College or Millersville University if I receive approval to do so from the Chief Judge of the Eastern District. I plan to give up these classes if my ability to perform my judicial duties would be affected by my teaching.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more. (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

See Financial Disclosure Report, attached.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

See Net Worth Statement, attached.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

In 1986, I served as campaign chairman for the election campaign for Vickie Bomgardner, who was running for a district justice position in the City of Lancaster. I had almost no responsibility for that campaign. The responsibility for filing reports and accepting contributions fell to the campaign treasurer, not to me. My participation was limited to accompanying the candidate on several occasions as she went door-to-door in my neighborhood. I believe I also gave out her brochures at my polling place for several hours on election day.

I have had no other experience in a political campaign beyond my own effort to be elected in 1991.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES				
Cash on hand and in banks	6	000	00	Notes payable to banks-secured		N/A		
U.S. Government securities-add schedule		N/A		Notes payable to banks-unsecured		N/A		
Listed securities-add schedule		N/A		Notes payable to relatives		N/A		
Unlisted securities--add schedule		N/A		Notes payable to others		N/A		
Accounts and notes receivable:		N/A		Accounts and bills due (monthly bills)	5	000	00	
Due from relatives and friends				Unpaid income tax		N/A		
Due from others				Other unpaid income and interest		N/A		
Doubtful				Real estate mortgages payable-add schedule	148	000	00	**
Real estate owned-add schedule	190	000	00*	Chattel mortgages and other liens payable		N/A		
Real estate mortgages receivable		N/A		Other debts-itemize:				
Autos and other personal property	25	000	00					
Cash value-life insurance		N/A						
Other assets itemize:		N/A						
Pensions: State Employee Retirement System	101	109	64					
(amount of contribution paid in)								
				Total liabilities	153	000	00	
				Net Worth	169	109	64	
Total Assets	322	109	64	Total liabilities and net worth	322	109	64	
CONTINGENT LIABILITIES				GENERAL INFORMATION				
As endorser, comaker or guarantor		N/A		Are any assets pledged? (Add schedule)		No		
On leases or contracts		N/A		Are you defendant in any suits or legal actions?		No		
Legal Claims		N/A		Have you ever taken bankruptcy?		No		
Provision for Federal Income Tax		N/A						
Other special debt		N/A						

* Residence

** Washington Mutual holds the mortgage.

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

In 1996, I served on a Pro Bono Blue Ribbon Panel for the Lancaster Bar Association. This group met several times to discuss ways in which to enhance the delivery of legal services to underprivileged clients in Lancaster County. Our pro bono program in Lancaster County is extremely successful and supplements the work of the MidPenn Legal Services office, which at the time was known as Central Pennsylvania Legal Services. We have a relatively high rate of involvement from our Bar. Our Board of Judges has been a significant force in encouraging members of our bar association to devote time to work with the underprivileged in pro bono cases.

In 2001, when I was president-elect of the Lancaster Bar Association, I was deeply involved in assessing the way in which our bar association delivers services to underprivileged clients. At the time, MidPenn Legal Services and the Lancaster Bar Association had identified certain issues on which there was disagreement. The main issue had to do with the adequacy of services to the MidPenn clients in Lancaster County. We explored ways in which to increase volunteer time by our attorneys to assist the MidPenn Legal Services office. We also explored whether the Lancaster Bar Association should create an independent legal services office to better assist their clients.

In 2002, when I was president of the Lancaster Bar Association, we formed the Lancaster Bar Association Foundation. The primary purpose of the foundation is to investigate ways in which legal services to the underprivileged in Lancaster County can be enhanced. The foundation has the ability to apply for grants and distribute funds. We anticipate that this foundation will provide us with a vehicle to form a legal services office or to assist the existing legal services office, as necessary.

Also during my term as president, I formed the Diversity Task Force. One purpose for the task force has been to explore ways in which the organized bar can assist those attorneys providing services to minority clients in Lancaster.

When I was a practicing attorney, I participated in the Lancaster Bar Association's pro bono program. In addition, I served as a guardian ad litem for abused children in Lancaster County Children & Youth Agency proceedings. My compensation for guardianship work was provided by the court at a rate which was substantially less than the hourly rate I was charging regular clients.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

I do not currently belong to any organization which discriminates on the basis of race, sex or religion.

I am a social member of the Conestoga Country Club, which is a golf/swimming pool/dining facility. Conestoga Country Club does not have any policy which discriminates either in formal membership requirements or practical implementation of membership policies.

I was a member of the Hamilton Club of Lancaster, a social/dining club with exercise facilities, from 1987 through September 18, 1995. The Hamilton Club of Lancaster excluded women as members until 1989. During the time I was a member, there was a change in that policy through a vote of the membership. I wrote a letter to the Board of Directors advocating this change and voted in favor of the change.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

There is a Federal Judicial Nominating Commission for the United States District Court for the Eastern District of Pennsylvania. Senators Specter and Santorum have a federal judicial nominating commission for each federal district in Pennsylvania. The Nominating Commission for the Eastern District of Pennsylvania recommended my nomination for a position on the federal bench.

I have appeared before the federal judicial nominating commission on several occasions, the most recent being May 2003. The initial interviews generally were before a panel of three, followed by interviews in the afternoon before the entire commission, consisting of, I believe, approximately 16 members.

I have been recommended by the Federal Judicial Nominating Commission for an opening on the Eastern District of Pennsylvania each time I have interviewed, have been interviewed by White House counsel, the FBI, and the Department of Justice, completed various forms and was nominated on November 6, 2003.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No one involved in the process of selecting me as a judicial nominee has discussed any specific case, legal issue or question in a manner that could be interpreted as asking me how I would rule on such a case.

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. **A tendency by the judiciary toward problem-solution rather than grievance-resolution;**

b. **A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;**

c. **A tendency by the judiciary to impose broad, affirmative duties upon governments and society;**

d. **A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and**

e. **A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.**

The single most important function of a trial judge is to decide cases under the existing law. The process of deciding cases involves the gathering and finding of facts, either through a trial, a hearing, stipulations, or through information developed in discovery. Once the facts relevant to a particular issue are settled, a judge must identify the applicable law and apply that law to the facts. An overriding concern is that this be done in a prompt and efficient manner, which requires the trial judge to be an effective administrator in the office and in the courtroom.

Article III of the United States Constitution establishes the judicial power which, under Section 2, extends to "cases" and "controversies." This means that a judge acts within the context of a case or controversy presented by the parties in the course of a civil or criminal case. As I explain to my students in the course I teach, courts are essentially passive institutions. That is, if the parties did not present questions for resolution, courts would have nothing to do. We are not a "proactive" branch of government in that we do not create laws nor do we extend our power to direct the actions of parties beyond the specific confines of a case or controversy. The role of creating the law falls on the legislature, the role of enforcing the law rests with the executive, and the role of interpreting the law lies in the judiciary.

There are times when the resolution of a legal dispute involves a great exercise of power and the fashioning of a remedy which affects the lives of the litigants and others similarly situated. This exercise of power should be limited by the existing law, should have as its purpose the interpretation of existing law, and should be done with respect to the relative roles of the separate branches of government. At the federal level, it should also be done with an eye toward the proper relationship between the federal and state courts. This sense of perspective together with an open-minded approach, an emphasis on sound judgment and a commitment to an even-handed treatment of all parties before the court, are essential for a judge to be effective.

Senator CRAIG. I have been watching Joseph. He has demonstrated phenomenal tolerance. And I thank you for that, Joseph, and welcome before the Committee.

Let me turn, if I can, to my colleague, Senator Chambliss, for any questions you might have of either of these nominees.

Senator CHAMBLISS. Just very quickly, Mr. Chairman, I have already made comments relative to my knowledge of Mr. Duffey's background. Obviously, I am extremely supportive of the confirmation of both of these gentlemen.

Mr. Duffey, let me just ask you one or two things, though, for the record relative to your particular practice before the Federal bench, as well as the State bench. I understand you have had extensive trial experience, both obviously post being named United States Attorney, but as well as previous to that time.

Would you just generally give us a history of your background relative to your trial experience?

Mr. DUFFEY. Yes, Senator Chambliss. I have been a lawyer since 1977, and in every assignment that I have had in those now almost 26 years my responsibilities have been in the courtroom.

I began my career as a Judge Advocate in the Judge Advocate General's Corps, in the United States Air Force. I had the unusual opportunity my second 2 years on active duty to be assigned as what was known as the circuit trial counsel, which gave me responsibility with one other lawyer for trying all the Air Force's felony cases throughout the Southeast United States. I was responsible for 44 cases, and 22 of those I tried to verdict.

In private practice at King and Spalding, which I have had two terms with, I was either in commercial litigation or the special matters group of King and Spalding, and all of that work was involved in litigation generally of complex civil and criminal matters.

When I was with the independent counsel's office, I was responsible for three parts of the Whitewater investigation, made grand jury appearances, and was responsible for one case that actually was prosecuted and concluded.

And since being the United States Attorney, I have been actively involved in all of our litigated matters and have had the privilege of representing the United States in two arguments before the Eleventh Circuit Court of Appeals. And I have tried two cases while United States Attorney, which is not the norm for United States Attorneys.

Senator CHAMBLISS. Let me ask both of you a question I ask all of our nominees, and that is obviously as a lawyer you have the obligation to represent your client as a strong advocate. And we all as lawyers, I hope—I was in that same category with the two of you of working very diligently for my clients over the years that I practiced law.

When you become a judge, obviously, and you put on the robe, you step into a different atmosphere, and that atmosphere is one of paying close attention to precedents that have been established and getting away from the personal feelings that you have to make sure that we follow those precedents that are established by all of our courts, from the Supreme Court on down.

Do each of you know and understand the difference between following precedents and legislating from the bench, and are you pre-

pared to accept the new responsibility that you would have to make sure that you do not legislate from the bench?

Bill?

Mr. DUFFEY. Senator, I think that that is the principal responsibility of a judge, is to follow precedent and to apply the law as it has been announced by the Supreme Court or the circuit which I am in, the Eleventh Circuit. It is a wholly different discipline from being an advocate, in that it is my responsibility, should I be confirmed, to make sure that I follow the precedent, follow the law, as it has been announced by the courts.

Senator CHAMBLISS. Thank you.

Mr. Stengel?

Judge STENGEL. Well, Senator, I have been sitting as a State court trial judge since October of 1990 and have had the obligation and the privilege over that time to consider many criminal and civil cases. I have tried at this point probably several hundred criminal and civil cases, and have attempted in each case to diligently apply the law of our commonwealth and of the Federal courts, where applicable, to the cases I have been handling. So, yes, I think that is central to the role of an effective judge.

Senator CHAMBLISS. Thank you. Thank you, Mr. Chairman.

Senator CRAIG. Saxby, thank you very much for those questions.

Senator Chambliss has asked the question of precedent that I think is critical to ask judges as it relates, certainly, to the district court in relation to the circuit court, in relation to the Supreme Court. Let me ask, then, I think, a follow-up question. It is something that the Committee attempts to seek of those who are before them as nominees, and so I ask this of both of you.

Given your background and prior experience, could you speak for a moment about the role and significance of judicial temperament and indicate what element of judicial temperament you consider to be the most important?

Mr. Duffey?

Mr. DUFFEY. I think judicial temperament is one of the most important qualities that this Committee or anybody evaluating judges has to take into account. Everybody who is in a courtroom—sometimes the only encounter that they have with the judicial system is that particular trial or that particular hearing. And they will leave that courtroom, whether they are a litigant or they are an observer or they are a member of a jury, with an impression of the court system based upon that experience.

Therefore, I think it is incumbent upon the judge to allow everybody to leave that hearing with the belief that they have treated the parties fairly, that they have allowed the litigation to proceed and for the advocates to perform their jobs to the utmost of their ability, that they have treated all people with dignity, and that ultimately through the conduct of the trial, the hearing or the proceeding that it was done with objectivity and fairness, and that people left feeling as if justice has been done. And that can only be done, I believe, Mr. Chairman, by somebody who sits on the bench that creates that atmosphere.

Senator CRAIG. Thank you.

Mr. Stengel?

Judge STENGEL. Senator, I think that temperament involves elements of courtesy. I think it is essential that the judge who is in charge of the courtroom exhibit an attitude of courtesy to everyone who participates, from witnesses to litigants, to uncooperative witnesses, to pro se defendants. I think that to listen courteously and to consider the position of that person in that case is critical.

Much of temperament from the bench has to do with listening. We are not great speakers necessarily or people who have a lot to say during a proceeding. Ours is, I think, to listen carefully, listen critically, and make sure that the situation in the courtroom leads to a fair hearing both in how it appears and how it actually is.

In a State court trial practice, I have litigants—1 day, you may have a world-famous forensic pathologist in a case. The next day, you may have a seriously mentally ill pro se criminal defendant. And I think that the message is the same and the procedure is the same, and that each person who comes in there deserves to be heard, deserves to be treated fairly. And I think a lot of that comes from the attitude and the conduct and the temperament of the person in charge.

Senator CRAIG. Mr. Stengel, you have served 14 years as a judge.

Judge STENGEL. Nearly 14, sir, yes.

Senator CRAIG. I think you have already spoken to this, but maybe you could take another moment to tell us why that experience prepares you obviously now for the Federal bench.

Judge STENGEL. I view the roles in a very similar way. I view the move to the Federal court as a way of continuing a career which has been a very satisfying career to me in public service at another level and in another framework.

I think certainly in a state court courtroom, there is a great volume of cases. I would look to the Federal courts perhaps as involving cases of greater complexity, but perhaps less volume. But the volume that I have managed over nearly 14 years, I think, has given me skills and a sensitivity to the importance of case management and in not only conducting full and fair hearings, but doing so in an expeditious way so that people who are waiting for a result, people who are waiting for a hearing, get in the courtroom and get the decision. And I think it is a question of administration most that I think would have prepared me in my State court work for a position on the Federal bench.

Senator CRAIG. Mr. Duffey, you have spent over 25 years practicing law and have served both as a prosecutor and as a defense counsel. What do you think is the biggest challenge you will face in your new role if you are confirmed as a district judge?

Mr. DUFFEY. Well, thank you, Mr. Chairman. I feel as if my background has maybe uniquely prepared me for this opportunity. As you mentioned, I have the blessing of having served in almost any role that you could serve in a trial court, save for presiding over the proceeding. Not only was I a prosecutor, but I did, as you observed, defend a lot of criminal cases.

A significant portion of my practice in my old law firm was in plaintiff's work, albeit on the commercial side. But I not only saw the litigation process from the needs of somebody instituting the action, but also then defended a number of companies and individuals in litigation in the civil side.

I have thought a lot about this transition and I believe that all of those things that have been in my background have prepared me, and I look forward to moving toward a place where I can apply those skills that I have developed and apply the experience that I have had. In managing a courtroom and a docket so that the people that are in the position that I am in now and I have been in the past have the opportunity to adequately represent their clients and move cases toward resolution.

Senator CRAIG. Obviously, that experience is extremely valuable, I would trust. I am not an attorney. I have never stood before a judge in that regard.

Mr. DUFFEY. I believe it is invaluable.

Senator CRAIG. Yes. Well, gentlemen, to both of you thank you very much for your time, your patience, and your responses. I would trust this Committee will move you expeditiously from the Committee to the floor for confirmation, and I would hope that that would happen sooner rather than later. Obviously, you are needed on the bench, as caseload in most States is sizable, and I am sure you would be needed at work. So I thank you both for your testimony and for your patience and the patience of your families.

We will keep the record of this Committee open. We will hold the record open for written questions until 5:00 p.m. on Friday, February 13. Otherwise, we will get into a recess. The staff has hopefully been able to access computers and draft statements, and all that can happen in a timely fashion.

Based on your record, you two may be subject to written questions asked of you, and so we would hope that you would respond to those as quickly and timely as possible.

With that, I don't know of anything else to come before the Committee and the Committee will stand in adjournment.

[Whereupon, at 1:03 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

William S. Duffey, Jr.
4825 Franklin Pond Road
Atlanta, Georgia 30342

March 1, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Office Building
Washington, DC 20510

Dear Senator Hatch:

I am enclosing my responses to the written questions I received from Senator Durbin. Please let me know if there is further information I can provide to the Committee.

Sincerely,

William S. Duffey, Jr.

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member

Responses of William S. Duffey, Jr. to the Written Follow-up Questions of Senator Richard J. Durbin

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

   Response: **I did not meet with any members of the Senate Judiciary Committee staff. No staff members shared, referenced or provided me with information that led me to believe was obtained or derived from Democratic sources. No staff members provided me with any documents or excerpts from documents that appeared to have been drafted or prepared by Democratic staff.**

2. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, did any staff of the Justice Department share,

reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: **Before my scheduled hearing I met with staff from the Department of Justice. No Justice Department staff members shared, referenced or provided me with any information that led me to believe was obtained or derived from Democratic sources. No staff members provided me with any documents or excerpts from any documents that appeared to have been drafted or prepared by Democratic staff.**

3. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: **Before my scheduled hearing I met with an individual on the White House staff. No White House staff members shared, referenced or provided me with any information that led me to believe was obtained or derived from Democratic sources. No staff members provided me with any documents or excerpts from any documents that appeared to have been drafted or prepared by Democratic staff.**

4. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic

sources? Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: **I did not meet with any other people, groups or organizations outside of the government in connection with my confirmation hearing. No person, group or organization outside of the government shared, referenced or provided me with any information that led me to believe was obtained or derived from Democratic sources. No person, group or organization outside of the government provided me with any documents or excerpts from any documents that appeared to have been drafted or prepared by Democratic staff.**

COURT OF COMMON PLEAS
SECOND JUDICIAL DISTRICT
LANCASTER COUNTY, PENNSYLVANIA

LAWRENCE F. STENGEL
JUDGE

50 NORTH DUKE STREET
P.O. BOX 83480
LANCASTER, PENNSYLVANIA 17608-3480
(717) 293-7296

March 1, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I am enclosing my answers to Senator Richard J. Durbin's questions, which were submitted to me on Monday, March 1, 2004. With a copy of this letter to Senator Leahy, I am providing him with a copy of these answers as well.

Thank you for your attention to this matter.

Sincerely,

Lawrence F. Stengel

LFS/md

Enclosure

cc: The Honorable Patrick J. Leahy, Ranking Member
Committee on the Judiciary

Responses of Lawrence F. Stengel to the Written Follow-up Questions of Senator Richard J. Durbin

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

   Response:

   In preparation for my confirmation hearing before the Senate Judiciary Committee, I did not meet with any staff of the Senate Judiciary Committee. No staff of the Senate Judiciary Committee shared, referenced or provided me with any information that I was led to believe was obtained or derived from Democratic sources. No staff of the Senate Judiciary Committee provided me with any documents or excerpts from documents that appeared to me to have been drafted or prepared by Democratic staff.

2. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response:

In preparation for my confirmation hearing before the Senate Judiciary Committee, I met with staff of the United States Department of Justice. During those meetings, no member of the staff of the Justice Department shared, referenced or provided me with any information which was obtained or derived from Democratic sources. No member of the staff of the Justice Department provided me with any documents or excerpts from documents that appeared to have been drafted or prepared by Democratic staff.

3. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response:

In preparation for my confirmation hearing before the Senate Judiciary Committee, I met with a member of the staff of the White House. No member of the staff of the White House shared, referenced, or provided me with any information which I was led to believe was obtained or derived from Democratic sources. No staff of the White House provided me with any documents or excerpts from documents which appeared to have been drafted or prepared by Democratic staff.

4. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response:

In preparation for my confirmation hearing before the Senate Judiciary Committee, I did not meet with anyone associated with individuals, groups or organizations outside of government that support, endorse or advocate in any way on behalf of the confirmation of President Bush's judicial nominees. No individuals, groups or organizations shared, referenced or provided me with information which I was led to believe was obtained or derived from Democratic sources. No individuals, groups or organizations provided me with any documents or excerpts from documents that appeared to me to have been drafted by Democratic staff.

William S. Duffey, Jr.
4825 Franklin Pond Road
Atlanta, Georgia 30342

February 19, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
224 Dirksen Office Building
Washington, DC 20510

Dear Senator Hatch:

I am enclosing my responses to the written questions I received from Senators Leahy and Kennedy. Please let me know if there is further information I can provide to the Committee.

Sincerely,

William S. Duffey, Jr.

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Member

The Honorable Edward M. Kennedy

Responses of William S. Duffey, Jr.,
Nominee to the U.S. District Court for the Northern District of Georgia,
to Written Questions Submitted by Senator Leahy

1. Mr. Duffey, during the mid-1990s you were a prominent member of the Whitewater investigation performed by the Office of Independent Counsel. According to your Senate Questionnaire, you "supervised all aspects of the Arkansas phase of the investigation." Several years following your role in that investigation, in a speech to the Criminal Law Section of the Atlanta Bar Association in 2002, you described your experience in the Whitewater investigation as an "acute" part of the process that led you to enter public service.

a. Can you please describe to the Committee which experiences in that investigation led you to want to enter public service?

Response: I believe the opportunity to perform public service is an honor in any position to which a person is called. Prior to becoming the United States Attorney, I was afforded two such opportunities. The first was my active duty service in the Air Force Judge Advocate General Corps. The second was my work in the Office of Independent Counsel. My work in Arkansas reminded me of the privilege and fulfillment that came from my active duty service in the Air Force. In both positions, I appreciated the responsibility entrusted in me to perform my work with integrity, my duty to protect the rights and reputations of all participants in the process, and the obligation to deal with all parties fairly. As a result of my experiences, I decided that I would seek additional public service opportunities during the course of my career. As a matter of clarification, the speech to the Atlanta Bar Association Criminal Law Section in 2002 was not about my experience on the Whitewater investigation. My comments concerned the issues I addressed in considering whether to leave private practice to perform government service, and the benefit to my family and me of living in a smaller community in Arkansas.

b. Would the same values that led you to pursue a public advocacy position as a federal prosecutor conflict with the values that federal judges should possess, namely, fairness and impartiality?

Response: No. I do not view the responsibility of the federal prosecutor to be one of public advocacy. The prosecutor's responsibility is a weighty one and was best summarized by Justice Sutherland in Berger v. United States, 295 U.S. 88 (1935). This quote was brought to my attention early in my career by former Attorney General Griffin B. Bell when we worked together at King & Spalding and it sits framed next to my desk. Justice Sutherland wrote:

> **"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt not escape or innocence suffer."**

I believe strongly that a judge must faithfully pursue fairness and justice and consistently act with impartiality. Having served as a defense counsel, a prosecutor, and plaintiff's lawyer, I know the judge is the guardian of the fairness and integrity of our judicial process. I am committed to adhering strictly to these values should the Senate confirm me.

2. A few months ago you gave another speech to Belmont University entitled "Whitewater, White Powder, and White Paper". Despite this title and the content of the slides from your Powerpoint presentation, you describe the purpose of this speech to be related to the "value of public service."

a. Which of the slides from your presentation directly address or even mention the "value of public service"?

Response: I do not ordinarily use Powerpoint presentations to outline my remarks but to help provide context for what I say. The slides provided context for the remarks I made about the three public service assignments that were the subject of the speech.

b. If your responsibilities in the Whitewater investigation were limited to the prosecution of former Governor Jim Guy Tucker, why are the relevant slides focused on former President Clinton? Why are none of the slides that you selected to use in your speech about your case against your defendant?

Response: I was not responsible for the prosecution of former Governor Tucker. As Deputy Independent Counsel I had administrative and general oversight responsibility for investigative activities and staffing in Arkansas. As I explained above, the slides provided context for the remarks I made about the three public service assignments that were the subject of the speech.

c. Do you think it is appropriate for a current United States Attorney to give speeches with a Department of Justice official seal on them that use an editorial cartoon depicting President Clinton navigating around politically dangerous obstacles? Why did you select this cartoon to talk to students about "public service"? And what does the notation "DEK502064" on this slide indicate? Was this cartoon an exhibit in a legal proceeding? Please explain.

Response: The Whitewater slides were used to provide historical context for the Whitewater investigation because the students to whom I was speaking at Belmont generally were very young when the investigation began. The slides were used during the portion of my talk where I discussed that Attorney General Janet Reno commenced the investigation at the request of President Clinton and as a result of an article published by the New York Times. The real estate purchase had become one of several issues which were then being reported in the press and the two clippings illustrate the aggressive manner in which the issues were being reported and interpreted in the press. The next slides were used in connection with my description of how Robert Fiske was appointed independent counsel and his national reputation as a fair and objective lawyer with a unique set of experiences that fit the requirements of his appointment. I explained I came to work on the investigation after Mr. Fiske had contacted colleagues of mine at King & Spalding. Mr. Fiske asked them to recommend lawyers to assist in the investigation and they encouraged me to consider this public service opportunity. When I met with Mr. Fiske about joining the staff he told me he wanted the investigation to be conducted by highly qualified people from the public and private sectors, including

lawyers with experience in complex investigations. His goal also was to hire lawyers from across the country. Mr. Fiske impressed upon his staff that it was important to the nation to investigate and resolve the Whitewater issues promptly. Mr. Fiske's approach to the investigation convinced me the assignment would be undertaken with integrity and I accepted his invitation to join his staff.

The next set of slides illustrated generally how drugs are transported into the United States by foreign trafficking organizations and the impact of these trafficking activities in our district. I discussed how federal and state law enforcement are working together to disrupt the flow of illegal drugs into our country including by analyzing the scope and organization of drug trafficking organizations and their operations.

The final set of slides was used to discuss the Department of Justice's response to the problem of corporate fraud. They helped to illustrate that we are focusing less on accounting issues and more on fraudulent conduct and efforts to obstruct investigations. This strategy change has allowed us to attack the problem of corporate corruption to deter conduct which harms investors and the public.

The theme throughout the talk was the need for people to consider public service at some time during their life. Each of the examples I cited was used to illustrate the important issues and problems that affect our country and the fulfillment that comes from public service work in these areas.

I do not know the meaning of the notation on the slide and I do not recall the slide ever being used in a legal proceeding. I know that I did not use the clipping for any purpose in the investigation or in any legal proceeding.

d. Have you used any of these slides in other speeches on the topic of Whitewater?

Response: The November 2003 convocation event was the only time I used the slides relating to Whitewater.

e. Have you given any other speeches on the topic of your participation in the Whitewater investigation other than those listed in the aforementioned questions? If so, please provide transcripts and/or descriptions of their contents.

Response: The information provided above describes what I have presented about my Whitewater investigation experience.

3. Please describe how you came to be hired by the Office of the Independent Counsel in the mid-1990s?

Response: Robert Fiske contacted Frank C. Jones and former Attorney General Griffin B. Bell to ask them to recommend lawyers who might be willing to join his staff. Mr. Jones and Judge Bell asked me to consider the assignment.

4. In light of your involvement in the Whitewater investigation, the Federalist Society, the National Republican Lawyers Association and a private organization designed to "grow the ranks of Republican leaders," how can you assure this Committee that if confirmed you would be a fair and unbiased judge -- no matter how disagreeable the facts or applicable law may be to you personally?

Response: I understand a judge must always act impartially and fairly. I have considered the United States Attorney job and our work in this office as the neutral ground of government. I have disengaged entirely from all political activities because I believe my responsibilities require me always to act, and for the public to believe I am acting, in an objective, nonpartisan and fair manner. A judge's duty is to be true to the law and legal precedent, regardless of how he or she feels about the matter under consideration. I pledge to do that because our judicial system and our democracy require it.

Responses of William S. Duffey, Jr.,
Nominee to the U.S. District Court for the Northern District of Georgia,
to Written Questions Submitted by Senator Edward M. Kennedy

1. During the 1990s, you served as a member of the Whitewater investigation conducted by the Office of Independent Counsel. In your Senate questionnaire, you state that "you supervised all aspects of the Arkansas phase of the [Whitewater] investigation." You also state that you continued consulting in the investigation after you returned to private practice.

   a. Please state when your work with the Whitewater investigation ceased, including any work you performed as a consultant after leaving the Office of the Independent Counsel.

   Response: On June 1, 1995, I left the Independent Counsel investigation and returned to private practice at King & Spalding in Atlanta. At the request of the Independent Counsel, I remained available to consult with the investigation. I did not perform any work on the investigation after early 1996.

   b. Please describe in detail the work you performed as a consultant in the Whitewater investigation after your departure from the Office of the Independent Counsel.

   Response: My consultation consisted of a few phone calls with the Office of Independent Counsel staff during the period between June 1995 and early 1996. The calls generally were about matters I had worked on while I was in Arkansas. The questions typically concerned who had been interviewed, my recollection of the chronology of various events, the location of documents, which agents had worked on various matters, and similar types of questions.

2. You have provided the Senate Judiciary Committee with several slides that you used in a giving a speech in your capacity as United States Attorney to the Belmont University Convocation Program in November 2003, entitled "My Personal Experiences in and the Rewards of Public Service." Please explain the significance of each of these slides in the context of that speech and in the context of your view of public service.

   Response: In November 2003, my son's professor at Belmont University asked me to speak about my experiences in public service.

The professor suggested that I include in my presentation a discussion about the Whitewater investigation because the students would be interested in it. I agreed, and selected two other public service assignments in which I had been involved during my professional life. I used these three examples to illustrate the value of performing public service and the personal reward I received from working in the three areas.

The Whitewater slides were used to provide historical context for the Whitewater investigation because the students to whom I was speaking at Belmont generally were very young when the investigation began. The slides were used during the portion of my talk where I discussed that Attorney General Janet Reno commenced the investigation at the request of President Clinton and as a result of an article published by the New York Times. The real estate purchase had become one of several issues which were then being reported in the press and the two clippings illustrate the aggressive manner in which the issues were being reported and interpreted in the press. The other slides were used in connection with my description of how Robert Fiske was appointed Independent Counsel and his national reputation as a fair and objective lawyer with a unique set of experiences that fit the requirements of his appointment. I explained I came to work on the investigation after Mr. Fiske had contacted colleagues of mine at King & Spalding. Mr. Fiske asked them to recommend lawyers to assist in the investigation and they encouraged me to consider this public service opportunity. When I met with Mr. Fiske about joining the staff he told me he wanted the investigation to be conducted by highly qualified people from the public and private sectors, including lawyers with experience in complex investigations. His goal also was to hire lawyers from across the country. Mr. Fiske impressed upon his staff that it was important to the nation to investigate and resolve the Whitewater issues promptly. Mr. Fiske's approach to the investigation convinced me the assignment would be undertaken with integrity and I accepted his invitation to join his staff.

The next set of slides illustrated generally how drugs are transported into the United States by foreign trafficking organizations and the impact of these trafficking activities in our district. I discussed how federal and state law enforcement are working together to disrupt the flow of illegal drugs into our country including by analyzing the scope and organization of drug trafficking organizations and their operations.

The final set of slides was used to discuss the Department of Justice's response to the problem of corporate fraud. They helped to illustrate that we are focusing less on accounting issues and more on fraudulent conduct and efforts to obstruct investigations. This strategy change has allowed us to attack the problem of corporate corruption to deter conduct which harms investors and the public.

The theme throughout the talk was the need for people to consider public service at some time during their life. Each of the examples I cited was used to illustrate the important issues and problems that affect our country and the fulfillment that comes from public service work in these areas.

3. If you have used any of these slides in other speeches concerning Whitewater, please indicate which speeches and how these materials were used.

Response: The November 2003 convocation event was the only time I used the slides related to Whitewater.

William G. Myers III

Boise, Idaho

February 18, 2004

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

Please find attached to this letter my answers to written questions from Senator Feinstein following my nomination hearing on February 5, 2004.

Sincerely,

William G. Myers III

cc: Honorable Patrick J. Leahy

Attachment

Answers of William Myers III to Questions of Senator Dianne Feinstein

1. **During your career as an environmental lawyer – as far as I can tell – you have exclusively represented the interest of industries that utilize public lands.**

   - **From 1993-1997, you served as Executive Director of the Public Lands Council (PLC), a trade association representing sheep and cattle ranchers in 15 western states that use federal grazing permits.**

   - **As an attorney with the Boise law firm of Holland & Hart from 1997-2001, you served as corporate counsel for Cattlemen Advocating Through Litigation (CATL), the litigation arm of the Public Lands Council (PLC). You also represented mining companies like Arch Coal and Peabody Coal.**

   Question: Did you ever in your private sector legal career litigate against the interests of the mining or the ranching industry? Could you cite each case for me?

Response: I have represented ranchers in litigation against other ranchers in administrative proceedings. For example, in *Agri Beef Co. v. BLM,* (IBLA 2001-116) and *Katsilometes v. BLM,* (IBLA 98-287) my clients challenged decisions of the Bureau of Land Management in order to restrict other ranchers' commercial use of BLM land. Similarly, I have represented clients who actively opposed use of federal land for oil and gas exploration and ranching but these matters were not in litigation. For example, proposed oil and gas exploration conflicted with my client's use and enjoyment of his land, including the land's aesthetic and ecosystem values. In another matter, my client was concerned about a rancher's development and use of a livestock right-of-way across BLM land. I advised these clients on the agencies' obligations to ensure compliance with environmental safeguards.

Your question noted my representation of Arch Coal and Peabody Coal. I would like to take the opportunity to clarify that my representation was limited to support of federal legislation that was also supported by the Department of the Interior under Secretary Babbitt. The bill passed the Senate without amendment by unanimous consent, passed the House by voice vote, and was signed into law by President Clinton. (Public Law 106-463)

Question: Have you ever litigated in support of restrictions on commercial use of public land?

Response: Yes. As Solicitor, I supported litigation and non-litigation activities restricting commercial use of public land for gold mining, ranching, off-shore oil and gas development, trespass in National Parks, expansion of national monuments, and protection of Indian sacred sites. As referenced above, I have also litigated to restrict ranchers' commercial use of BLM

land and I have represented clients actively opposed to use of federal land for mining exploration and livestock use.

2. During your career, you have publicly questioned the motives and merits of suits brought by environmental litigants. Consider some of the following statements:

- **You stated that environmental groups use the *"power of the judiciary in attaining goals otherwise unattainable in the legislative and administrative branches."***
- **You *claimed "environmentalists are mountain biking to the courthouse as never before, bent on stopping human activity where it may promote health, safety, and welfare."***
- **You wrote of the importance *of "rejecting the scheming of those engaged in the environmental conflict industry."***

These statements seem to reflect a pre-judgment of cases brought by members of certain groups.

Question: Given those statements, how can an environmental litigant feel like he or she could get a fair shake in a case brought before you as a Ninth Circuit judge?

Response: A review of my record demonstrates a respect for the rule of law. During my tenure as Solicitor of the Interior, I based my opinions and advice on a neutral and impartial reading of the law. In certain cases, environmentalists did not agree with my reading of the law. However, there are numerous instances where I have taken positions that environmentalists supported and that commodity interests or property-rights activists opposed. For example, I asked the Department of Justice to secure a preliminary injunction against a rancher who trespassed upon and destroyed portions of Marble Creek, one of the last natural streams flowing out of National Forest System lands in California's White Mountains. The rancher had entered onto public lands with a bulldozer and replaced a segment of the creek with a pipeline. The government contended that if the preliminary injunction were not granted, it would not be able to restore the creek before winter, thus endangering fish, wildlife, and vegetation. The United States District Court for the Eastern District of California granted the preliminary injunction. *See Harris v. United States*, No. S-03-878 (Nov. 5, 2003).

Likewise, I authorized a regional solicitor to take numerous cases to the U.S. Attorney in Nevada to enforce actions against ranchers who had trespassed on Bureau of Land Management lands and/or had refused to pay applicable grazing fees. Many of these ranchers were overgrazing and as a result were causing significant damage to BLM lands. I fully supported these actions to ensure that the land was properly used and thus preserved for future generations.

I also fought against oil and gas companies that sought to deprive the American public of several billion dollars by making oil and gas production from most of the deep water Outer Continental Shelf royalty-free for at least two decades. These companies won a favorable ruling from a federal district court in Louisiana that misinterpreted key provisions of the Outer

Continental Shelf Deep Water Royalty Relief Act ("DWRRA"). I, however, argued that the Department of the Interior's interpretation of DWRRA was reasonable, and, in order to safeguard the Treasury and to ensure that oil and gas companies did not enjoy an unjustified windfall, urged that the federal government appeal the district court's decision. As a result, the Department of Justice is now preparing to argue this appeal in the U.S. Court of Appeals for the Fifth Circuit.

While I was in the private sector, my responsibility was to represent my clients vigorously, making all reasonable legal arguments with a basis in law and fact. At times, my responsibilities also included advocating for my clients in a media forum. Should I be confirmed, however, it would be my responsibility to set aside these views and apply the Constitution and laws to the facts of the case before me without reference to personal political persuasions or the views of my former clients.

3. **In your article entitled "*Having Your Day in Court,*" you criticized certain activist judges for legislating from the bench in certain environmental cases. You cited the Clean Water Act as the best example of judicial activism and legislating from the bench. Specifically you said that *"the word "wetlands" cannot be found in the Clean Water Act. Only through expansive interpretation from activist courts has it come to be such a drain on the productivity of American agriculture."***

Question: In your view, what was Congress' intent with regard to wetlands when it enacted the Clean Water Act?

Response: Congress passed the Clean Water Act to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a). It is important to recognize, however, that the health of our Nation's waters is often inextricably connected to the health of adjacent wetlands. As such, the U.S. Supreme Court found that "Congress's concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the 'waters' of the United States.'" *SWANCC v. U.S. Army Corps of Engineers,* 531 U.S. 159, 167 (2001), *citing United States* v. *Riverside Bayview Homes, Inc.,* 474 U.S. 121, 134 (1985). Moreover, the intent of Congress in this area is further evidenced by its subsequent acquiescence to, and approval of, regulations issued by the U.S. Army Corps of Engineers interpreting the Clean Water Act to cover wetlands adjacent to navigable waters. If confirmed, I would apply Supreme Court precedent with regard to the Clean Water Act and wetlands.

You wrote your article in 1994. Ten years earlier, the Supreme Court in *United States v. Riverside Bayview Homes, Inc* unanimously upheld the application of the Clean Water Act to protect wetlands.

Question: Do you consider that unanimous Supreme Court decision to have been an activist court decision?

Response: No.

4. You have advocated litigation reform in order to curb what you see as the problem of environmental litigation. Specifically, you take the view that judges should take an active role in reducing lawsuits brought by environmentalists. You stated:

> ***"The courts themselves are partly to blame. A judge may require a plaintiff to post a bond for payment of costs and damages suffered by any opposing party that is restrained or enjoined from an activity later found by the court to be lawful. But judges have been reluctant to apply the rule to non-profit environmental organizations. These outfits face no financial risk when frivolously seeking a court-ordered injunction of a lawful activity."*** [redacted]

Question: What specific cases can you cite in which a non-profit environmental organization was *"frivolously seeking a court-ordered injunction of a lawful activity"* and the judge did not impose costs on the environmental plaintiff?

Response: I was not referring to a specific case when I wrote that article. Instead, I was referring to the application of Federal Rule of Civil Procedure 65(c). This rule states:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the United States or of an officer or agency thereof.

While the rule does not exempt non-profit organizations from its reach, research for a client led me to believe that some courts were reluctant to apply it to non-profit institutions. Thus, since this rule was designed to curb wrongful injunctions, I was concerned that non-profit institutions would be more likely to seek such injunctions if the rule were not applied to them.

5. You recently served as Solicitor for the Department of the Interior, the federal agency whose mission, in part, is to honor our responsibilities to American Indians and Alaskan Natives. Over 250 tribal governments who are collectively represented by the National Congress of American Indians issued a formal resolution opposing your nomination to the 9th Circuit.

In this resolution, they cited, among many other things, the failure of your office to consult with the Quechan Indian Tribe and other affected tribes regarding the proposed Glamis Imperial Gold Mine. As I understand it, the proposed mine would carve an 880-foot-deep mile-wide open-pit out of 1500

acres out land sacred to the Quechan tribe in eastern Imperial County California.

Question: Can you explain why you did not consult with the Quechan Tribe, or other affected Colorado River Tribes before rescinding the denial of the Glamis Gold Mine? Did you consult with representatives of the mining industry on this issue?

Response: As I was writing my opinion concerning the Glamis mine, which was triggered by a suspension of regulations and multiple lawsuits that had been filed against the Department of the Interior, the Tribe provided their views to me in a letter that included an invitation to meet in California. Shortly after receiving the letter, the terrorist attacks of 9/11 occurred and I did not schedule the trip. The Tribe stated that it had been consulting with Interior over many issues, including the Glamis Mine, and I later confirmed that BLM was consulting with the Quechan Indian Tribe on behalf of the Department. At the time, I did not consider this manner of consultation to be unusual. My predecessor as Solicitor did not meet with tribal leaders prior to the issuance of his 1999 opinion affecting the Glamis mine. In addition, I was already aware of the position taken by both sides of the dispute through their litigation filings and from my staff attorneys. After issuing my opinion, however, I did respond to the Tribe's concerns by consulting with Quechan Tribal leaders regarding the possibility of a federal buy-out of the Glamis mine.

While I was drafting my opinion, Glamis representatives asked to meet with me in Washington, DC to share their perspective, and I agreed to participate in such a meeting as I would have done had Quechan Tribal leaders asked for a meeting in Washington, DC. By the time of my meeting with Glamis representatives, however, I had already considered all of the relevant arguments, decided how I was going to resolve the legal issue, and begun drafting my opinion. Consequently, company officials were disappointed in their meeting with me because I did not engage them in a discussion of their ideas or views.

6. **While Solicitor of the Department of the Interior, you issued an opinion limiting the grounds the Department could use to prohibit mining operations on Federal land. Your opinion interpreted the Federal Land Policy and Management Act, which directs the Department to review mining operations to "prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection"**

Contrary to this plain language, you concluded that the Act permitted the Department of Interior to stop a mining project only where the operation was unnecessary and caused undue degradation. In other words, you replaced the word "OR" with an "AND".

Judge Henry Kennedy of the District Court recently held that your opinion "misconstrued the clear mandate" of the Federal Land Policy Management Act (see Mineral Policy Center v. Norton, 292 F. Supp. 30). Judge Kennedy

found not only that your interpretation was wrong, but also that it contravened three well-established canons of statutory construction.

First, "the language of the statute should govern";

Second, when interpreting a statute, the court is "obliged to give effect, if possible, to every word Congress used;" and

Third, "the word 'or' is to be given its normal disjunctive meaning, unless such a construction renders the provision in question repugnant to other provisions of the statute."

Question: Do you disagree with Judge Kennedy's conclusion that your opinion contravened three well-established canons of statutory construction? If so, please explain how your opinion satisfied each of the above canons of statutory construction?

Response: I do not agree that my opinion contravened three well-established canons of statutory construction. Although my opinion addressed a difficult question of statutory construction about which reasonable people certainly could disagree and I respect Judge Kennedy's opinion as precedent, I stand by the conclusion reached in my opinion and believe it to be consistent with each of the canons of statutory construction referenced in your question. My opinion was also consistent with the first interpretation of section 302(b) of the FLPMA contained in regulations promulgated by the Department of the Interior during the Carter Administration.

I believe that my interpretation of section 302(b) of the Federal Land Policy Management Act (FLPMA) was consistent with the language of the statute. In my opinion, I noted that the meaning of the word "or" is often ambiguous. While it sometimes signifies that two words are alternatives, at other times it is used to link equivalents, such as FLPMA's singular definition of the phrase "major or principal uses." After examining the meaning of the terms "unnecessary" and "undue," the text of section 302(b) of FLPMA, the statute's legislative history, as well as other uses of the word "or" in FLPMA, I reached the conclusion in my opinion that the word "or" in section 302(b) was being used to link equivalents rather than alternatives. My opinion was thus was based on the language of the statute and was consistent with the canon of statutory construction that the language of the statute should govern.

As you also noted, an important canon of statutory construction obliges a court to give effect, if possible, to every word used by Congress. I believe that my opinion was consistent with this canon. Indeed, I cited to this "cardinal principle of statutory construction" in page 12 of my opinion. As noted above, I carefully considered in my opinion how to give meaning to the word "or," and I reached the conclusion that it was best interpreted in section 302(b) as linking equivalents rather than alternatives.

Finally, I believe that my opinion was consistent with the canon that the word "or" is to be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statute. I indicated, for example, in my opinion that interpreting the word "or" in section 302(b) of FLMPA as linking alternatives rather than

equivalents would have been inconsistent with both the design and purpose of the statute as a whole as well as its legislative history. In particular, I pointed out in page 11 of my opinion that giving a broad interpretation of section 302(b) would have conflicted with FLPMA's explicit acknowledgement of the continued vitality of the Mining Law of 1872.

While Judge Kennedy did criticize part of my analysis and I respect his opinion as precedent, I also appreciate that he agreed with my ultimate conclusion that the new regulations promulgated by the Department of the Interior would protect the public lands from unnecessary or undue degradation.

William G. Myers III

Boise, Idaho

February 20, 2004

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

Please find attached to this letter my answers to written questions from Senators Leahy, Kennedy, Feingold, and Durbin following my nomination hearing on February 5, 2004.

Sincerely,

William G. Myers III

cc: Honorable Patrick J. Leahy

Attachment

ANSWERS TO WRITTEN QUESTIONS FOR WILLIAM MYERS NOMINEE TO THE US COURT OF APPEALS FOR THE NINTH CIRCUIT FROM SENATOR PATRICK LEAHY

1. **When the Clinton Administration issued its roads moratorium policy, you argued that wide ranging decisions affecting public lands should go through the legislative, not the executive, branch, and that regulations by the executive "*suffer from a lack of moderation instilled by opposing views.*" Fewer than three years after you made these comments, you called on the Bush/Cheney administration to "*take a page from the Clinton/Gore playbook*" and argued the "*executive branch has significant opportunities to review regulations, policies, manuals and handbooks that dictate the health of the partnership between ranchers and the federal government.*"**

   a) **How do you reconcile these two contradictory statements?**

Response: My 1998 article suggested that the Clinton Administration's roads moratorium had sufficiently broad impact as to merit consideration in Congress. That moratorium has spawned nine lawsuits, four of which were filed by states, and is currently under a nationwide injunction following a ruling in one of those cases. The second article suggested that the new administration should review a wide range of existing policies and determine what it could accomplish administratively, just as the Clinton Administration did. If any administration over-reaches in its use of the administrative process, however, that over-reaching will be challenged in court and the administration may, in hindsight, have been better off going to Congress.

   b) **Do you believe the Bush administration's rollbacks of environmental protections – for example its attempts to weaken the Clean Air Act and its attempts to significantly change the National Environmental Policy Act through executive rulings - "*suffer from a lack of moderation instilled by opposing views*"? Please explain why or why not.**

Response: One thing I learned as a senior administration official that I did not appreciate when I wrote the 1998 article is the breadth of opposing views within the Executive Branch on a variety of public policy. The theory of the unitary Executive is often more theory than reality. I am not sufficiently familiar with the examples to say whether they suffer from a lack of moderation.

   c) **What do you believe is the role of the judicial branch with regard to environmental regulations? What facts could assure the Committee that if you are confirmed to a lifetime position as a federal appellate judge that you would not use your rulings to bring environmental laws more in line with your ideology?**

Response: I believe that it is the role of the judicial branch to interpret and apply environmental laws and regulations in an impartial manner. A judge should be guided by the law and not by his or her personal policy preferences. A review of my record

demonstrates a respect for the rule of law. During my tenure as Solicitor of the Interior, I based my opinions and advice on a neutral and impartial reading of the law. In certain cases, environmentalists did not agree with my reading of the law. However, there are numerous instances where I have taken positions that environmentalists supported and that commodity interests or property-rights activists opposed. For example, I asked the Department of Justice to secure a preliminary injunction against a rancher who trespassed upon and destroyed portions of Marble Creek, one of the last natural streams flowing out of National Forest System lands in California's White Mountains. The rancher had entered onto public lands with a bulldozer and replaced a segment of the creek with a pipeline. The government contended that if the preliminary injunction were not granted, it would not be able to restore the creek before winter, thus endangering fish, wildlife, and vegetation. The United States District Court for the Eastern District of California granted the preliminary injunction. *See Harris v. United States*, No. S-03-878 (Nov. 5, 2003).

Likewise, I authorized a regional solicitor to take numerous cases to the U.S. Attorney in Nevada to enforce actions against ranchers who had trespassed on Bureau of Land Management lands and/or had refused to pay applicable grazing fees. Many of these ranchers were overgrazing and as a result were causing significant damage to BLM lands. I fully supported these actions to ensure that the land was properly used and thus preserved for future generations.

I also fought against oil and gas companies that sought to deprive the American public of several billion dollars by making oil and gas production from most of the deep water Outer Continental Shelf royalty-free for at least two decades. These companies won a favorable ruling from a federal district court in Louisiana that misinterpreted key provisions of the Outer Continental Shelf Deep Water Royalty Relief Act ("DWRRA"). I, however, argued that the Department of the Interior's interpretation of DWRRA was reasonable, and, in order to safeguard the Treasury and to ensure that oil and gas companies did not enjoy an unjustified windfall, urged that the federal government appeal the district court's decision. As a result, the Department of Justice is now preparing to argue this appeal in the U.S. Court of Appeals for the Fifth Circuit.

2. You have been critical of pro-environmental organizations and called for limits on litigation by environmentalists. For example, you wrote, "*Environmentalists are mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety and welfare.*" Given your public statements on this subject, how could plaintiffs in your court who are members of environmental organizations be treated fairly?

Response: It is a primary duty of a judge to dispassionately apply the Constitution and the laws to the facts of any individual case. I believe that a review of my record demonstrates a respect for the rule of law. My response to Question 1(c) sets forth several examples of positions I have taken that environmentalists supported. At other times, environmentalists did not agree with my reading of the law. While I was in the private sector, my responsibility was to represent my clients vigorously, making all reasonable legal arguments with a basis in law and fact. At times, my responsibilities

also included advocating for my clients in a media forum. Should I be confirmed, however, it would be my responsibility to set aside these views and apply the Constitution and laws to the facts of the case before me without reference to personal political persuasions or the views of my former clients.

3. **One very effective way our environmental laws are enforced in this country is through citizen suits. Because the federal government cannot get to all polluters, many environmental statutes contain an explicit right allowing for these "private attorneys general" to ensure that polluters are complying with federal mandates. But despite Congress' explicit mandates, over the past decade the federal judiciary has increasingly closed its doors to environmental plaintiffs.**

   a) **What role do you think federal judges should play in limiting Congress' ability to create legal rights enforceable in court?**

Response: Outside of enforcing Constitutional constraints, judges should play no role in limiting the ability of Congress to create legal rights enforceable in court.

   b) **How would you ensure that you provide meaningful access to the courts for all plaintiffs, not just those who seek to further your own ideological agenda?**

Response: If confirmed, I would provide meaningful access to the courts for all plaintiffs by carefully and fairly applying precedent from the Supreme Court and Ninth Circuit, no matter who the parties are in a particular case.

   c) **What is your understanding of the law relating to standing to challenge environmental regulations? Do you think the current precedents on standing are too strict or too lenient? Please explain.**

Response: In *Lujan v. Defenders of Wildlife*, the Supreme Court set forth a tripartite test for standing: (1) the plaintiff must have suffered injury in fact, (2) a causal connection must exist between the injury and the conduct complained of, and (3) it must be likely that the injury will be redressed by a favorable decision. The approach to the first element, injury in fact, was loosened in *Friends of the Earth, Inc, v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), when the Court held that the relevant showing is not injury to the environment but only injury to the plaintiff. The Court also held that a continuing violation is sufficient to satisfy the redressability standard.

If confirmed, I would apply these precedents regardless of whether they were considered too strict or too lenient.

4. **During the recent debate on the Healthy Forests bill, I fought hard – albeit unsuccessfully - to eliminate the bill's unreasonable limits imposed on judges when they are faced with legal challenges to logging plans. For example, the**

law as proposed by the Bush Administration would prohibit judges from granting waivers to filing deadlines, urges courts to expedite consideration of cases, and limits any preliminary injunction to 45 days. Do you agree that the legislative branch be able to dictate to the judicial branch which cases on their dockets are most important at any particular time, without a constitutional mandate to do so?

Response: While I believe that it is vital to maintain the separation of powers, I think it would be imprudent for me to comment on a matter that could come before me if I am confirmed.

5. **At your hearing, you stated that you "spent a fair amount of time volunteering for both the National Park Service and occasionally for the national forest in the U.S. Forest Service System," estimating that you spent an average of 12 days a year over the last 15 years conducting such volunteer work. Why did you fail to mention this in your Senate questionnaire, in response to the question asked of you to describe your volunteer activities, when you listed other volunteer activities that were not specifically provided "to the disadvantaged," as the question specified?**

Response: I did not mention my volunteer service to the National Park Service or United States Forest Service on my Senate questionnaire because I read the questionnaire as asking about pro bono legal services. My work on behalf of the Park Service and Forest Service was unrelated to my status as an attorney. Similarly, I did not mention on the questionnaire other volunteer service I have performed for the disadvantaged because that service was not in my capacity as an attorney.

6. **At your hearing, the Penobscot settlement was cited as a high-profile dispute that you settled in favor of environmental groups.**

   a. **Is the Penobscot agreement final yet? If not, how far along was it when you left the Solicitor's office? What was the exact role you played in the negotiations of the settlement? In a news article after the settlement was announced, the business community praised the settlement as a "win-win situation" for private business as well as the environment. How did this settlement benefit private industry involved?**

Response: My recollection is that the agreement in place when I left the Solicitor's Office established a process to implement numerous aspects of the deal. Most of the credit for the agreement belongs to the staff attorney and her supervisor in the Boston office of the Solicitor's Office who spent countless hours in negotiations. I did not have that luxury. I did, however, meet with these attorneys in Boston where I received a relatively detailed briefing on the history of the issues, the negotiation status and anticipated issues. I did not specifically negotiate or draft the agreement but I approved of the agreement and encouraged continued, active involvement in the negotiations. Afterwards, I continued to receive status reports on the discussions. The settlement

impacted eight hydroelectric facilities and three dams owned by hydropower interests. Much of the lost electric generation capacity was to be recouped without use of the dams.

b. At your hearing, you claimed credit for the Penobscot settlement while distancing yourself from other negotiations that occurred under your watch at the Department of the Interior. For example, when asked about the Robbins settlement, you stated that you were "not involved in the negotiations or discussions of that settlement, other than to tell a subordinate attorney that he had authority to try to settle that case" and that you played "no role" in the settlement negotiations. As Solicitor, how did you determine which negotiations to be involved with and which to delegate?

Response: Generally, I participated in matters that I thought might rise to the level of secretarial interest or decision-making so that I would be prepared to advise the Secretary if necessary. This was not a formulaic exercise and I did not always correctly anticipate the needs of the Secretary. The Solicitor's Office personnel manual, in place when I arrived in the office, provides for delegation of settlement authority to the Deputy Solicitor, Associate Solicitors, and Regional Solicitors.

c. Other examples of settlement negotiations that you took credit for at your hearing were the Colvin v. Snow case, in which you took credit for specifically authorizing a regional solicitor in Nevada to seek enforcement actions against ranchers who refused to pay applicable grazing fees for their use of public lands, and Harris v. U.S., where you testified that you worked with BLM to get an injunction against illegal activity by a rancher. When asked why you were not directly involved in the Robbins settlement, you testified that "it was wholly contained within the Department of Interior as a dispute between the BLM and the rancher." Why did you get involved in certain BLM disputes and not the Robbins settlement?

Response: The *Colvin v. Snow* case and *Harris v. U.S.* case were both brought to my attention by the Regional Solicitor in Sacramento. He wanted to brief me on these actions against ranchers, knowing that I had some expertise in grazing issues. He was ready to pursue enforcement actions against these bad actors who were flaunting the BLM's rangeland regulations and the statutes. In addition to a telephonic briefing, I received background materials on the cases and recommended next steps. The *Harris v. U.S.* case was filed in the Eastern District of California. The Robbins matter was presented to me as an opportunity to settle administrative litigation. Not until some months after the settlement was achieved did I read that some groups thought it was illegal. When I read that, I dispatched an uninvolved supervisory attorney in my office to look into it. I left the office before that review was complete.

7. **At your hearing in July 2001, when you were being considered for the position of Solicitor General of the Department of Interior, you said that you had "no intention of going into office and immediately reviewing former Solicitor's opinions." In October 2001, you issued a legal opinion in your role as solicitor, entitled "Surface Mining Provisions for Hardrock Mining," in which you overturned the 1999 opinion of your predecessor, Solicitor John Leshy, in order to pave the way for Interior Secretary Gale Norton to reverse former Secretary Bruce Babbitt's rejection of a permit for the Glamis Imperial Gold Mine project.**

   a. **Why were you willing to reverse this opinion three months after you testified that you had no intention of immediately reviewing former Solicitor's opinions?**

Response: My testimony was intended to suggest that I personally had no plan to reverse systematically my predecessor's legal opinions. Indeed, in the 27 months that I served as Solicitor, I reviewed only a few of the many opinions issued by Solicitor Leshy. Of those that I reviewed, I agreed with some and disagreed with others.

Prior to my appointment as Solicitor, the Department of the Interior had suspended the 2000 regulations affecting hard rock mining. Those regulations were based in part on one of my predecessor's opinions. Multiple lawsuits regarding the suspended regulations were also pending when I arrived. I therefore felt an obligation to review the opinion that was common to these controversies to determine if the Department's defense to the lawsuits was viable.

   b. **When did you begin review of that opinion and with whom, if anyone, outside of the Department of Interior did you consult with about the issue?**

Response: I began the review within my first month on the job. After I had settled on an approach and had begun drafting the opinion, representatives of a mine affected by the 2000 regulations sought a meeting with me and came to my office to discuss their perspective. This discussion, however, had no impact on my opinion as I had already decided how I was going to resolve the issue.

8. **When you were Solicitor of the Department of Interior, were you involved in any way with the decision of whether or how the rules or regulations governing grazing on public lands – such as the rules adopted on February 22, 1995 under the banner of "Rangeland Reform" – should be modified or implemented? If so, please describe your role in making such changes.**

Response: The 1995 regulations are under the authority of the Bureau of Land Management. New administration officials in BLM started a review of those regulations as well as new ideas for range management that would require regulations. This effort evolved into drafts of draft regulations for possible publication in the Federal Register. I

reviewed those early drafts. Subsequently, BLM decided to not to publish draft regulations and instead published an Advanced Notice of Proposed Rulemaking. After the close of the public comment period, I participated in some, but not all, of the discussions regarding the draft regulations. Although I was not disqualified from participating in deliberations and discussions about Federal grazing policy, I nonetheless decided to recuse myself from discussions related to grazing preference – an issue I had briefed to the Supreme Court in 2000. I left the Department two months before the draft regulations were published in the Federal Register.

9. **In a law review article you wrote about the defeat of Judge Robert Bork's nomination to the Supreme Court, you discuss the nomination of Judge John J. Parker to the Supreme Court of the United States in 1930, and you write that those Senators who opposed the nomination "came to regret their position and recognize their error." One of the controversies surrounding Judge Parker's nomination centered around a statement he made when he ran for governor of North Carolina. At that time he said, "[t]he negro as a class does not desire to enter politics. The Republican party of North Carolina does not desire him to do so." Judge Parker claimed that to interpret his statement as "anti-black" was "totally unjustified." Why did you think it necessary to try to rehabilitate Judge Parker's reputation in your defense of Judge Bork?**

Response: I do not agree with the statements of Judge Parker contained in your question and I abhor any expression of racial animus. My point in that passage was not to rehabilitate Judge Parker's reputation. Rather, it was to illustrate that groups across the political spectrum had opposed other Supreme Court nominees long before Judge Bork's nomination. I illustrated that point by noting group opposition to the nominations of Justice Brandeis, Judge Parker, Justice Marshall, and Justice Powell and that history had been more kind to all of these nominees than their opponents would have predicted at the time.

10. **In two of your articles, you appear to embrace Judge Bork's judicial philosophy. In addition to the theoretical concepts discussed in your articles, you seem to agree with Judge Bork's decisions in the case of Dronenberg v. Zech, regarding gay rights and privacy, as well as the Supreme Court's decision in Bowers v. Hardwick. As you know, that case was recently overruled, when a majority of the Supreme Court repudiated both the reasoning and the result in the Bowers decision. Do you continue to believe that the Constitution's provisions do not provide any protection for gays? Do you believe it should not?**

Response: I believe that the Constitution protects the rights of all Americans regardless of sexual orientation. If I am confirmed, I would follow Supreme Court precedent in all matters related to the right of privacy and equal protection.

11. In your article, you defend Judge Bork's attacks on the Warren Court for issuing decisions "without any anchor in the Constitution or statutes." Please name at least three decisions from that era that exemplify this criticism.

Response: The quoted passage was a statement of Judge Bork's opinion of the Warren Court; it was not a statement of my opinion of the Warren Court.

Answers to Questions for William G. Myers III
Nominee to the U.S. Court of Appeals for the Ninth Circuit
Submitted by Senator Edward M. Kennedy

1. During your February 5, 2004 confirmation hearing, you testified about your involvement in a $49 million settlement with Shell Oil. Please explain the precise nature of your role in that negotiating that settlement. In particular, please describe any meetings you had with any Indian tribe potentially affected by that settlement.

Response: I was briefed on the violations that occurred at one of Shell Oil's drilling platforms in the Gulf of Mexico. I discussed the matter with the head of the Minerals Management Service (MMS) in the Department of the Interior. MMS manages the nation's mineral resources on the Outer Continental Shelf in federal offshore waters. I approved the recommendation to the Department of Justice to pursue what is the largest penalty settlement in MMS's history. As far as I am aware, no Indian tribe was affected by the settlement of these violations that occurred in the Gulf of Mexico.

2. The denial of the Glamis Imperial Gold Mine was rescinded by Secretary of the Interior based on your October 2001 Solicitor's opinion reversing a 1999 opinion by then-Solicitor Leshy. The Inspector General (IG) of the Interior Department investigated that Department's decision in the Glamis Imperial Gold Mine Project matter. The report of that investigation describes a September 13, 2001 meeting between you, members of your staff, and representatives of Glamis Gold, Ltd. and notes that participants in that meeting "specifically discussed . . . Glamis' theory on why the December 1999 legal opinion issued by then-Solicitor John Leshy was flawed." The IG report also notes that the Glamis representatives "'told their story'" to you and other representatives of the Interior Department's Solicitor General's office.

A. Before your confirmation to the position of Solicitor General of Interior, you stated in response to a written question from Sen. Wyden as follows: "I have no doubt I will regularly meet with persons and groups engaged in fundamental disagreements.... I will also bring to the position my personal experience working on committees and in groups whose memberships were intentionally diverse and at times combative." However, it appears that before issuing your October 2001 opinion regarding the Glamis Imperial Gold Mine project, you did not consult with the Quechan Tribe nor any other tribe affected by that project. How do you explain your failure to do so, in light of your statement to Senator Wyden?

Response: My comment to Senator Wyden was a statement that I expected to receive many requests for meetings from diverse groups after I became Solicitor. In reality, however, I received very few requests for meetings during my tenure, perhaps because I had let it be known

both inside Interior and outside that I did not see the Solicitor's Office as a policy-generating office, as I testified in response to a question from Senator Hatch. My predecessor did not meet with the Tribe prior to issuance of his opinion affecting the Glamis mine, nor did I. I did, however, subsequently meet with Quechan Tribal leaders and their attorney to discuss their concerns regarding the mine and the possibility of a federal buy-out of the mine.

B. Although it appears that you had no direct input from the Quechan tribe before issuing your October 23, 2001 Solicitor's opinion, did you receive any input at all – including indirectly – from the Quechan Tribe regarding their view of the December 1999 opinion or allow them to tell their story regarding the Glamis Imperial Gold Mine project? If so, please describe in detail the nature of that input, who provided it to you, and how you considered that input in drafting your opinion.

Response: I received a letter from counsel to the Tribe while I was drafting my opinion. The letter set forth the Tribe's view of the 1999 opinion and the Glamis proposal. As I stated in response to the previous question, neither my predecessor nor I met with the Tribe prior to issuing our respective legal opinions. I also received input on the Tribe's views from attorneys in my office who were familiar with the controversy and the Tribe's views as expressed in its filings in the pending litigation.

C. It is my understanding that the Quechan Tribe wrote to you on August 31, 2001, informing you of its interest in the Glamis Imperial Gold Mine project, and expressing an interest in meeting with you about that matter. However, it appears that you did not respond until several months later, well after issuing your October 2001 opinion that formed the basis for Secretary Norton's decision to permit the Glamis Mine project to proceed. Why did you wait so long to respond?

Response: This is the same letter to which I referred in my previous answer. Upon receipt of the letter, staff attorneys in the Solicitor's Office began drafting a response. In the meantime, a number of letters from other tribes arrived in the Department on the same subject. The draft response was held and revised to address these other letters as well. The draft then circulated for approval between the Division of Indian Affairs and the Division of Mineral Resources in the Solicitor's Office. I received the final draft a few days before I reviewed and signed it. I apologized in my letter for the delayed response. I did, however, take the Tribe's views as expressed in its letter and litigation filings into account prior to formulating my opinion on this matter.

3. You testified that before issuing your October 2001 legal opinion you personally met with representatives of the Glamis Imperial Gold Mine, but not with the Quechan tribe, before deciding to overturn the Department of Interior's prior opinion regarding the mine. When I asked you about your decision not to meet with members of the Quechan tribe, you responded that you were "informed that the Bureau of Land Management [BLM] was consulting with them, and [you] thought that was appropriate."

A. When did the meetings between BLM and the Quechan tribe to which you referred in your response take place?

Response: I do not know when those meetings took place.

B. When and how did you learn of those meetings?

Response: I believe I first learned of the consultation in the August 31, 2001 letter from the Tribe's attorney where she informed me that the Tribe had been consulting with the Department for many years over many issues, including this one. I was later told by Solicitor's Office staff, staff in the Assistant Secretary's Office, or BLM staff that the BLM office in California was consulting with the Tribe at various times and on various issues related to the mine.

C. By this response, did you mean that you believed that any discussion the BLM may have had with the tribe was sufficient to provide you with all of the information about the tribe's views that would be pertinent to your opinion? If so, please explain in detail the basis for that belief. If not, please explain in detail what you meant to convey by this response.

Response: I meant to convey that I was under the impression that the Department of the Interior was fulfilling its ongoing consultation obligations to the Tribe through contacts with departmental officials, and specifically with the BLM office in California. I also believed that the Tribe's letter to me and filings in pending litigation provided me with sufficient information about the Tribe's views.

D. Please identify any BLM official(s) who met with representatives of the Quechan tribe to discuss the Glamis Imperial Gold Mine before you issued your opinion regarding that matter. In addition, please state which tribal representatives the BLM official(s) met, and when those meetings occurred.

Response: The information I received was no more specific than that Mike Pool with the BLM in California, and his staff, had consulted with the Tribe and were keeping the Tribe informed of significant developments regarding the mine site.

E. Did the BLM convey to you the tribe's concerns about the Glamis Imperial Gold Mine project? If so, please state in detail the specific information you received from BLM about the tribe's concerns regarding the Glamis Imperial Gold Mine. In addition, please include who conveyed that information to you, when, and whether you considered that information in drafting your opinion on the matter, and how it was relevant to your decision.

Response: The Tribe's concerns were conveyed to me by its attorney's letter and by career

attorneys in my office who were familiar with the Tribe's filings in the pending litigation and who had spent considerable time on these issues during the previous Administration and in the current Administration.

4. You have testified that you met with representatives of the Glamis Imperial Gold Mine project before issuing your opinion affecting that project, but "not by invitation." Please explain how you came to meet with representatives of the mine, why you decided to meet with them personally, and whether you did so at the mining company's request.

Response: Representatives called for an appointment to meet with me in my office in Washington, DC. My secretary scheduled the meeting and I met with them. I did not invite them to come discuss the issues with me. I decided to meet with them because they requested a meeting on an issue within the jurisdiction of the Solicitor's Office and because, as a public official, I was willing to meet with citizens who wanted to meet with me. The representatives of the mining company were disappointed by their meeting with me because I would not engage them in a discussion of their ideas or views on the matter. This is because I had already formulated my views on the matter prior to the meeting and had already begun to draft my opinion.

5. All nominees to the federal courts are asked to submit to the Senate a list of their 10 most significant cases. In reviewing your list of ten most significant cases, it appears that you did not participate in a trial in any of these cases. Is this correct?

Response: No. I tried the case of *Matthew Johnston, et al. v. Board of Trustees.* I may have tried the *Matter of Estate of Reed* case; my recollection is vague. I also participated in the trials of *Public Lands Council v. Babbitt* and *Idaho Watersheds Project v. Hahn.*

6. In listing the 10 most significant cases on which you have worked, you included the case of Idaho Watersheds Project v. Hahn. The court's docket sheet indicates that your client removed you and your law firm from the case several months before the district court issued a decision in that case.

Given the fact that you were removed as counsel in that case, is it correct to conclude that you had no part in the final briefing and courts before the court? Is it also correct that you played no role in any appeal of the Idaho Watersheds Project case?

Response: I did not participate in briefing motions for permanent injunction or the appeal. However, I did participate from the time of the filing of the complaint through intervention by my clients and decisions of the court on motions for preliminary injunction and partial summary judgment.

7. If you are confirmed, will you recuse yourself from any cases involving your former firm or clients, as well as from cases involving the precise issues regarding which you were

involved in limitation?

Response: If I am confirmed, I would disqualify myself from any case where in private practice with my former firm I served as a lawyer in the matter in controversy. I would also disqualify myself from any case where, when I was at my former firm, a lawyer from my firm served as a lawyer in the matter in controversy. More broadly, I will disqualify myself in any proceeding involving my former firm or former clients in which my impartiality might reasonably be questioned. This would require my recusal from any matters handled by my former firm for a reasonable period of time necessary to allay concerns regarding partiality. I understand this period of time generally is two years, or longer if other factors are involved. And I would recuse myself if a former client appeared before me and my former representation of the former client was in any way related to the matter pending before me. If a former client were to appear before me in a matter unrelated to my former representation, I would recuse myself, again, for a number of years to allay concerns.

Answers of William G Myers III to Written Questions from

Sen. Russ Feingold

February 20, 2004

1. Attached are three recent briefs that the Department of Justice has filed, which argue that the SWANNC decision is not limited to navigable waters in fact. When I asked you about your interpretation of SWANNC you testified that "[t]he Supreme Court ruled in favor of the solid waste agencies [in SWANNC], and I suppose you could say by reference to by my amicus part, since we were on the side of the petitioners, and determined that the Clean Water Act did not extend to isolated, intrastate, non-navigable wetlands." You also stated with respect to the Department of Justice's approach in the attached briefs, "if their approach is consistent with my understanding as just announced, I would not disagree with it. That's my understanding of the ruling in SWANNC." Please review the attached briefs and the SWANNC decision.

A) Do you agree with the Administration's position in *U.S. v. Rapanos* that "SWANNC does not limit the coverage of the CWA to navigable in fact waters and wetlands adjacent thereto"?

Response: The *SWANCC* court said its holding in *U.S. v. Riverside Bayview Homes, Inc.* was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the Clean Water Act to cover wetlands adjacent to navigable waters. The *SWANCC* court also cited *Riverside Bayview Homes* for its recognition that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." I consider *SWANCC* and *Riverside Bayview Homes* to be binding precedent. I think, however, that it would be imprudent for me to comment specifically on the Administration's position since that issue could come before me in the event that I am confirmed.

B) The brief continues: "to exclude non-navigable tributaries and their adjacent wetlands from the coverage of the Act would disserve the recognized policies underlying the Act since pollution of non-navigable tributaries and their adjacent wetlands can have deleterious effects on traditionally navigable waters." Do you agree with that statement?

Response: As this is an issue that I could face as a judge if confirmed, I hesitate to respond. To provide my personal opinion on an issue that could come before me as a judge would cause litigants to question my promise of impartiality.

2. In your article: *Having Your Day in Court*, published in the November/December, 1994 issue of *National Cattlemen*, you wrote:

Environmental organizations such as the Sierra Club Legal Defense Fund and the Natural Resources Defense Council have long used the courts to press their claims. When they could not obtain their goals through legislation or agency action, they used the courts. They have aggressively pursued their goals before friendly judges who have been willing to take activist positions and essentially legislate from the bench. No better example can be found than that of wetlands regulation.

The word "wetlands" cannot be found in the Clean Water Act. Only through expansive interpretation from activist courts has it come to be such a drain on the productivity of American agriculture.

A) Please list all of the cases you were referring to in that article (and any of which you have subsequently become aware) in which there has been an "expansive interpretation from activist courts" of "wetlands regulation."

Response: I wrote that article ten years ago when I was on the staff of the organization that published the magazine. If I had specific cases in mind, I cannot recall which ones they were. If confirmed, I would follow all precedent of the Supreme Court and the Ninth Circuit in this area. The Supreme Court has established wetlands precedent in its decisions in *United States v. Riverside Bayview Homes* and the *Solid Waste Agency of Northern Cook County v. Corps of Engineers*. The Supreme Court has found that "Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands 'inseparably bound up with the 'waters' of the United States.'" *SWANCC v. Army Corps of Engineers*, 531 U.S. 159, 167 (2001), citing *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 134 (1985).

B) If you are confirmed, would you follow these cases if they are precedent in the Ninth Circuit? To the extent that they are not binding precedent, how would you treat these cases?

Response: The Supreme Court has established precedent in its decisions in *United States v. Riverside Bayview Homes* and the *Solid Waste Agency of Northern Cook County v. Corps of Engineers* If confirmed, I would follow those decisions and the decisions of the Ninth Circuit as binding precedent.

C) You wrote your article in 1994. Were you aware that nine years earlier, in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the United States Supreme Court unanimously upheld the Reagan Administration's application of the Clean Water Act to protect wetlands? Did you then (and do you now) consider that unanimous Supreme Court to have been an "expansive interpretation" by an "activist court"?

Response: I do not recall whether I had considered the *Riverside Bayview Homes* decision when I wrote that article. As I noted above, that decision remains as binding precedent on the Ninth Circuit. I do not believe that the Supreme Court's decision in *Riverside Bayview Homes* was the decision of an activist court.

3. On January 15, 2003, the Bush Administration announced a notice of proposed rulemaking that declared that isolated wetlands and intermittent streams were not subject to protection under the Clean Water Act. In December 2003, the Administration rescinded this proposed rulemaking. Do you believe, under the SWANNC decision, that the Clean Water Act protects isolated waters and intermittent streams?

Response: The *SWANCC* court declined to hold that "isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under Sec. 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." The *SWANCC* court also said its holding in *U.S. v. Riverside Bayview Homes, Inc.* was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the Clean Water Act to cover wetlands adjacent to navigable waters. The *SWANCC* court also cited *Riverside Bayview Homes* for its recognition that Congress intended the phrase "navigable waters" to include "at least some waters that would not be deemed 'navigable' under the classical understanding of that term." I do not have either the January announcement or the December rescission, so I do not know how the Administration was defining the phrase "isolated waters and intermittent streams." Moreover, I would hesitate to comment on an issue that could come before me in the event that I am confirmed.

4. As I assume you know, Attorney General Edwin Meese III issued a memorandum entitled *Department Policy Regarding Consent Decrees and Settlement Agreements* "to be followed in all cases tried by counsel under the direction of the Attorney General" that continues to be invoked by government attorneys to this day. Attorney General Meese issued this policy, in his view, to prevent the misuse of settlement agreements that would "forfeit the prerogatives of the Executive in order to prevent the exercise of those prerogatives by a subsequent Administration."

The Meese Memo states "it is constitutionally impermissible for the courts to enter consent decrees containing such provisions where the courts would not have had the power to order such relief had the matter been litigated." A Secretary or agency administrator may enter into a consent decree "to revise, amend, or promulgate new regulations, but only so long as the department or agency is not precluded from changing those regulations pursuant to the APA."

A) Under the reasoning of the Meese memo, isn't the Utah settlement unconstitutional in that the Tenth Circuit had previously declared that Utah and the other plaintiffs did not have standing to sue Interior for BLM's wilderness study areas policy? How does this settlement comport with the Meese Memorandum, which clearly states that it is constitutionally impermissible for the courts to approve settlements where "the courts would not have had the power to order such relief had the matter been litigated" ?

Response: The settlement was entered into by the United States though the U.S. Attorney's Office and the Environment and Natural Resources Division of the Department of Justice. I assume Department of Justice personnel followed all relevant departmental policy in doing so. The action was pending in the United States District Court when the settlement was reached, and

I believe the Court entered an order approving the terms and conditions of the settlement, presumably on the belief that it had the power to do so.

B) Do you think it is proper for any agency to relinquish government powers in a lawsuit settlement when those powers could not have possibly been lost if the case had proceeded to trial?

Response: Settlements are reached when opposing parties mutually decide it is in each party's best interest to conclude litigation without proceeding to a verdict. The bases for that decision are as varied as the cases themselves, including resource allocation, litigation risk analysis, factual context, and often factors that are outside the specific case or controversy but important to the party.

5. Section 201 of FLMPA requires that BLM inventory its lands for a variety of resources and other values – including wilderness – as part of its ongoing planning process. At the hearing you testified that Section 603's 15-year deadline was the rationale for the Utah settlement.

A) How did you come to this conclusion when Section 201 and 202 of FLMPA clearly require BLM to review areas for wilderness designations on a continuing basis?

Response: Thank you for this opportunity to correct a statement I made at the hearing. In my testimony, I said that Section 603 of FLPMA set a 15 year limit on the Department's authority to inventory public lands for wilderness values. (T. 67-68). Section 201, however, is not so limited by Section 603. The Department has an ongoing obligation to inventory for resource and other values, including wilderness. As Section 201 says, the preparation and maintenance of the inventory does not change or prevent change of the management of use of the public lands. Section 202 requires the Secretary to develop, maintain, and revise land use plans for the use of the public lands. Section 202 requires the Secretary, in the development or revision of land use plans, to give priority to designation and protection of areas of critical environmental concern. Wilderness characteristics inventoried under Section 201 can be considered in the development of the Section 202 plans, including designation of areas of critical environmental concern. Under the settlement reached with Utah, the parties agreed that the authority contained in Section 603(a) expired by its own terms 15 years after enactment of FLPMA. The agreement recognized, however, that the Secretary retained Section 202 authority to designate and protect areas of critical environmental concern and Section 302 authority to prevent unnecessary or undue degradation of public lands.

B) Does the Utah settlement mean that BLM can no longer designate areas as wilderness study areas by administrative action?

Response: The settlement accepted by the court says, "The authority of [BLM] to conduct wilderness reviews, including the establishment of new [wilderness study areas], expired no later than October 21, 1993, with the submission of the wilderness suitability recommendation to Congress pursuant to Section 603. As a result, [BLM is] without authority to establish Post-603

WSAs, recognizing that nothing herein shall be construed to diminish the Secretary's authority under FLPMA to [manage land under Section 302(a), designate and protect areas of critical environmental concern, or take any action to prevent unnecessary or undue degradation of public lands.]" Therefore, the settlement agreement acknowledged that FLPMA limited BLM's authority under section 603 to designate areas as WSA's after October 21, 1993. The Secretary, however, continues to have the authority to protect such areas under sections 202 and 302.

Answers to Written Follow-up Questions for William Myers III
Nominee to the U.S. Court of Appeals for the Ninth Circuit
From Sen. Dick Durbin
February 20, 2004

1. You testified at your hearing that you had taken approximately a dozen cases to verdict. Please provide specific information about these cases including: the citation, if the case was reported and the docket number if unreported; a capsule summary of the substance of the case; the party or parties whom you represented; the nature of your participation in the litigation and the final disposition of the case; the date of representation; the name of the court and the name of the judge before whom the case was litigated; and the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Response:

1. ***Matthew Johnston, et al. v. Board of Trustees, School District #1 West, et al.***, 661 P.2d 1045 (Wyo. 1983)

Case Summary: My clients were parents who brought suit for a declaratory judgment and to enjoin placing a plan for a four-day school week into operation. The district court denied injunctive relief and held the plan to be lawful. I filed an appeal on behalf of my clients.

Party(ies) Represented: Matthew & Lorraine Johnston, Dan & Jeanne Scott, Richard & Susan Davis, Dan & Jan Daniels, James & Bette McLaughlin, Jerry Meyer

Nature of My Participation: I handled the representation at both the trial and appellate levels, including research, briefing and oral arguments.

Final Disposition of the Case: The Wyoming Supreme Court ruled in favor of my clients and held the plain meaning of the statute revealed the legislature's intent and that the board of trustees was not authorized to adopt a four-day school week.

Dates of Representation: 1982-83

Court, Judge(s): Supreme Court of Wyoming. Rooney, C.J.; Raper, Thomas, Rose & Brown, J.J.

Name, Address, Phone Number of Co-Counsel: None

Name, Address, Phone Number of Principal Counsel for Each of the Other Parties:

Rex O. Arney
Brown Drew & Massey

45 East Loucks Street
Sheridan, Wyoming 82801
307-673-8565

2. ***Matter of Estate of Reed***, 672 P.2d 829 (Wyo. 1983).

Case Summary: My client filed a petition for probate of a will alleging that a tape recording found in decedent's home was a valid holographic will. The trial court refused to admit the tape recording as a will.

Party(ies) Represented: Margaret F. Buckley

Nature of My Participation: I represented the plaintiff/petitioner, pro bono, on appeal. I researched and wrote briefs and argued the case in the state supreme court. I do not recall whether I filed the initial petition for probate of the will.

Final Disposition of the Case: The Wyoming Supreme Court affirmed the trial court's holding that a holographic will must be entirely in the handwriting of the testator. See also 42 A.L.R. 4th 167 (1985).

Date of Representation: 1982-1983

Court, Judge(s): Supreme Court of Wyoming. Rooney, C.J.; Thomas, Rose, Brown and Cardine, J.J.

Name, Address, Phone Number of Co-Counsel: None

Name, Address, Phone Number of Principal Counsel for Each of the Other Parties:

R. Brooke Holstedt
1328 Liberty Road SE
Salem, Oregon 97302-0018
503-363-8959

3. ***Public Lands Council v. Babbitt***, 929 F. Supp. 1436 (D. Wyo. 1996).

Case Summary: My clients facially challenged the Department of the Interior regulations affecting grazing on lands administered by the Bureau of Land Management. Plaintiffs sought declaratory and injunctive relief.

Party(ies) Represented: District Court: Public Lands Council, National Cattlemen's Association.

Nature of My Participation: I was serving as "in-house counsel" for Public Lands Council and National Cattlemen's Beef Association at the time of the action. I facilitated review of filings and client participation in the case in concert with co-counsel. I also attended the hearing as co-counsel.

Final Disposition of the Case: Interior regulations were vacated in key respects by the district court. Certain of those vacated regulations were eventually considered and upheld by the U.S. Supreme Court.

Date of Representation: 1995-1996

Court, Judge(s): U.S. District Court for the District of Wyoming. District Judge Clarence Brimmer.

Name, Address and Phone Number of Co-Counsel:

Connie Brooks
999 18th Street, Suite 1605
Denver, Colorado 80202
303-297-9100

Calvin Ragsdale
20 E. Flaming Gorge Way
Green River, Wyoming 82935
307-875-3235

Name, Address, Phone Number or Principal Counsel for Each of the Other Parties:

Gary Randall
U.S. Department of Justice
601 D. Street, NW, Room 3128
Washington, DC 20004
202-305-0444
202-208-4444

Laura Brown
U.S. Department of the Interior
Office of the Solicitor
1849 C Street, NW, Rm 6414
Washington, DC 20240

4. ***Forest Guardians v. U.S. Forest Service***, CIV99-615M/KBM (D.N.M. Jan. 18, 2001).

Case Summary: This case involved Freedom of Information Act litigation seeking escrow waivers submitted to the Forest Service by livestock operators with Forest Service permits. The escrow waivers provide financial and personal information to the Forest Service when grazing permits are used by permittees to secure loans from private-sector lenders.

Party(ies) Represented: AgAmerica Farm Credit Bank, Western Farm Credit Bank, Farm Credit Bank of Texas, AgriBank Farm Credit Bank, Ninth Farm Credit District

Nature of My Participation: My clients intervened in the litigation as defendants and cross-plaintiffs seeking to prevent additional release of information to Forest Guardians that my clients considered protected from release by FOIA and Forest Service regulations.

Final Disposition of the Case: The district court granted our summary judgment motion to set aside the agency's decision, denied plaintiff's motion for summary judgment and denied the agency motion to dismiss our cross-claim.

Date of Representation: 1999-2001

Court, Judge(s): U.S. District Court for the District of New Mexico, District Judge Mecham.

Name, Address, Phone Number of Co-Counsel: None

Name, Address, Phone Number of Principal Counsel for Each of the Other Parties:

Forest Guardians:
Richard Meitz
P.O. Box 8749
Santa Fe, New Mexico 87504
505-757-8431

Forest Service:
John Zavitz
National Advocacy Center
Department of Justice
1620 Pendleton Street
Columbia, South Carolina 29201
803-544-5100

5. ***Katsilometes v. Bureau of Land Management***, IBLA 98-287 (Oct. 4, 2002)

Case Summary: My client sought grazing privileges on BLM land. The BLM issued an adverse decision. My client appealed the decision to an Administrative Law Judge who dismissed the appeal for lack of standing. I appealed the ALJ's decision to the Interior Board of Land Appeals.

Party(ies) Represented: James G. Katsilometes

Nature of My Participation: While in private practice, I represented the client before the Administrative Law Judge and the IBLA, including the completion of all briefing. I left private practice and did not participate further in the matter prior to the issuance of the decision.

Final Disposition: The IBLA set aside the order of dismissal, affirmed in part and reversed in part the decision of the BLM, and remanded the matter to the BLM for further action.

Dates of Representation: 1997-2001

Court, Judge: Interior Board of Land Appeals, Administrative Judge David L. Hughes

Name, Address, Phone Number of Co-Counsel: None while I handled the case.

Name, Address, Phone Number of Principal Counsel for Each of the Other Parties:

For BLM:

Kenneth M. Sebby
550 W. Fort St.
Boise, ID 83724
208-334-1911

For Pete and Christine Miller Revocable Trust:
W. Alan Schroeder
447 W. Myrtle St.
Boise, ID 83701
208-384-1627

6. ***Dowton v. Bureau of Land Management***, 154 IBLA 222 (Mar. 30, 2001)

Summary: My client incorporated small parcels of land contiguous to his ranch. BLM issued a trespass notice. My client challenged the validity of the notice and the determination of damages based on fair market value appraisals.

Party(ies) Represented: Sydney Dowton

Nature of My Participation: I filed an appeal and supporting points and authorities with the IBLA.

Final Disposition: The IBLA ruled that the BLM trespass notice was proper in the absence of a land use permit, but set aside BLM's determination of the fair market value of the use of the public land as improper. The BLM decision was affirmed in part, and set aside and remanded in part.

Dates of Representation: 1999-2001

Court, Judge: Interior Board of Land Appeals, Judge C. Randall Grant, Jr.

Name, Address, Phone Number of Co-Counsel: None

Name, Address, Phone Number of Principal Counsel for Each of the Other Parties:

None, BLM employees from the Challis Resource Area Office appeared on behalf of BLM.

7. ***Dowton v. Bureau of Land Management***, 154 IBLA 291 (Apr. 19, 2001)

Summary: My client and BLM disputed ownership of a parcel of land between the Salmon River and the client's deeded land. At issue was whether the parcel had been created by accretion or avulsion of the river, thus determining ownership. BLM claimed ownership and

issued a trespass notice.

Party(ies) Represented: Sydney Dowton

Nature of My Participation: I filed an appeal and supporting points and authorities with the IBLA.

Final Disposition: The IBLA determined that the issue of accretion versus avulsion was a significant factual matter in dispute. The IBLA set aside the BLM's assessment of fees and damages and referred the matter to an Administrative Law Judge to develop the factual record.

Dates of Representation: 1999-2001

Court, Judge: Interior Board of Land Appeals, Judge C. Randall Grant, Jr.

Name, Address, Phone Number of Co-Counsel: None

Name, Address, Phone Number of Principal Counsel for Each of the Other Parties:

None, BLM employees from the Challis Resource Area Office appeared on behalf of BLM

8. ***Anita K. Anderson v. Geri Barr and Anderson & Barr LLC***, CV OC 9906833

Summary: My client operated a day care facility under a limited liability company. The members of the limited liability company began to disagree on management of the company. Litigation ensued regarding control and value of the company assets.

Party(ies) Represented: Anita K. Anderson

Nature of My Participation: I was brought into this case after Ms. Anderson terminated her prior attorney/client relationship. Ms. Anderson sought judicial dissolution of the LLC. I represented Ms. Anderson in filings and in open court.

Final Disposition: The court refused defendant's request to place the LLC in receivership. The court permitted my client to buy out the defendant's interest in the LLC.

Dates of Representation: 2000-01

Court, Judge: District Court of Idaho, Fourth Judicial District, Judge Deborah A. Bail

Name, Address, Phone Number of Co-Counsel:

Nathan Long

Echohawk Law Offices
P.O. Box 6119
Pocatello, ID 83205
208-478-1624

Name, Address, Phone Number of Principal Counsel for Each of the Other Parties:

Robert B. Burns
Moffatt Thomas
101 S. Capitol Blvd, 10th Floor
Boise, ID 83701
208-345-2000

The other cases are from my practice in Sheridan, Wyoming. I cannot recall details, including the nature of my participation, beyond what I provide below. All representation concluded by early 1985. None of the cases were reported. I took other matters to verdict during this timeframe but I cannot recall enough details to list them.

9. ***Alside Supply Co. v. Little Construction Co.***

Party(ies) Represented: Alside Supply Co.

Final Disposition: Judgment obtained against defendant, writ of execution issued.

Name, Address, Phone Number of Co-Counsel: Craig Kaufmann, Ohio

10. ***First National Bank of Greybull v. Mayland***

Party(ies) Represented: First National Bank of Greybull

Final Disposition: Judgment obtained. I also filed a post-judgment motion to correct an error in the original judgment.

11. ***Wanda Steele v. Darrel Peterson***

Summary: Action to satisfy a promissory note

Party(ies) Represented: Wanda Steele

Final Disposition: Judgment obtained.

12. ***King's Saddlery v. Sundance Mountain Ski Area***

Summary: Action to satisfy a promissory note

Party(ies) Represented: King's Saddlery

Final Disposition: Judgment obtained. Judgment transferred to District Court for execution against defendant's property.

Court, Judge: District Court of Wyoming, Fourth Judicial District

2. At your hearing, I asked you whether you would be willing to recuse yourself from cases involving your former law firm or former clients. You agreed to recuse yourself from such cases when you were the Interior Solicitor. You testified that you were unaware of the recusal rules within the Code of Judicial Conduct for federal judges. Please review that code, as well as 28 U.S.C. §§ 144 and 455, and respond to my question: if confirmed to the Ninth Circuit, would you be willing to recuse yourself from cases involving your former law firm or former clients?

Response: If I am confirmed, I would disqualify myself from any case where in private practice with my former firm I served as a lawyer in the matter in controversy. I would also disqualify myself from any case where, when I was at my former firm, a lawyer from my firm served as a lawyer in the matter in controversy. More broadly, I would disqualify myself in any proceeding involving my former firm or former clients in which my impartiality might reasonably be questioned. This would require my recusal from any matters handled by my former firm for a reasonable period of time necessary to allay concerns regarding partiality. I understand this period of time generally is two years, or longer if other factors are involved. And I would recuse myself if a former client appeared before me and my former representation of the former client were in any way related to the matter pending before me. If a former client were to appear before me in a matter unrelated to my former representation, I would recuse myself, again, for a number of years to allay concerns.

3. You have called environmental groups "litigation happy" and joked that they are "mountain biking to the courthouse as never before, bent on stopping human activity wherever it may promote health, safety and welfare."

A. Is it your belief that most litigation brought by environmental groups is frivolous? Please explain.

Response: No. As I said in the article, I was not suggesting that all or most environmental litigation was frivolous. Rather, I made a point common to all litigation, that frivolous claims delay and eventually deny justice for people or groups with legitimate claims. This would include legitimate environmental claims.

B. Which groups in particular to you consider to be "litigation happy" and what is the basis for that belief?

Response: I do not recall that "litigation happy" was my choice of words for the title to the article. The phrase does not appear in the body of the article. I suspect it was penned either by the service that distributed the article or by the newspaper that ran it.

4. I asked you at your hearing about the case of H. Frank Robbins, Jr., a Wyoming rancher with a long history of legal violations. You testified that you were "not involved in the negotiations or discussions of that settlement." However, the report of the Department of Interior's Inspector General indicates that you had two discussions with Regional Solicitor Bob Comer about the Robbins settlement prior to its completion. Interview notes indicate that you told the IG that you and Comer "discussed the administrative settlement of a series of disputes between BLM [the Bureau of Land Management] and a Wyoming rancher."

A. Please clarify precisely what role you played in the negotiations or discussions of the Robbins settlement?

Response: Bob Comer told me he planned to personally participate in an effort to settle disputes between the Worland, Wyoming office of the BLM and a rancher (Robbins). Occasionally, Mr. Comer would briefly update me that he was still engaged in the effort. I did not review specific settlement terms or negotiation strategy. I did not participate in the settlement discussions with either the BLM or Mr. Robbins and his attorney.

B. Wasn't it your responsibility, as Solicitor, to verify the legal propriety of any legal decisions and settlements entered into by the Department? Does the Director of BLM have final decisionmaking power over its settlements?

Response: As Solicitor, I managed an office of over 300 attorneys in 19 locations across the Nation. Previous Solicitors recognized that the personal attention of the Solicitor to the thousands of matters handled yearly by these attorneys would be impossible. They therefore adopted a manual to organize and run the office. The Solicitor's Office manual delegates extensive authority to Associate and Regional Solicitors to manage all of the legal affairs within their jurisdiction, including the settlement of administrative litigation. I recognized the inherent wisdom in this approach and continued to follow this established practice of delegation while I was Solicitor.

If a settlement is reached in federal court litigation, final decisionmaking power to enter into the settlement rests with the Department of Justice. If the settlement is a matter pending in administrative litigation, the BLM Director may decide to settle if an attorney from the Solicitor's Office has not made an entry of appearance in the matter. If a Solicitor's Office attorney has entered an appearance, that attorney works with the client office or bureau to determine whether to settle the case and both the attorney and client representative may sign the settlement agreement.

C. Since you were briefed on the Robbins settlement, weren't you effectively approving its terms? If you thought that the settlement was proceeding in an improper or illegal fashion, didn't you have the power to prevent it?

Response: I was not briefed on the terms of the settlement. Rather, I was only briefed that settlement discussions were about to commence or were continuing. Of course, if I had knowledge that the settlement was proceeding in an improper or illegal fashion, I would have had the power to prevent it and would have taken steps to do so.

D. How many settlements did the Department of the Interior complete during your tenure as Solicitor? Of those settlements, how many did you review?

Response: I do not know how many settlements the Department of the Interior completed during my tenure for reasons I set forth in response to question 4(B). While I was Solicitor, I sought increased funding every year to enhance the office's computer data base and case tracking system so that such information could be centrally gathered and available. No such system existed when I became Solicitor and this concerned me. While the office was closer to achieving this goal, the case tracking system was not in place when I left office.

I cannot recall how many settlements I reviewed. The number would not have been very high, again for reasons stated above.

5. You testified that you understood the Robbins matter "to be an administrative piece of litigation, which is to say it was wholly contained within the Department of the Interior between the BLM and the rancher." In August 2002, Matthew Mead, the U.S. Attorney for Wyoming, wrote to an Assistant Regional Solicitor raising very serious concerns about the draft Robbins settlement. He explained that the settlement would complicate enforcement of federal grazing law in Wyoming. "What justification," he asked in this letter, "is there for prosecuting all permittees other than Robbins for the same conduct?"

A. Given the involvement of the U.S. Attorney's office, wouldn't you agree that the Robbins settlement was not actually a matter "wholly contained within the Department of Interior between the BLM and the rancher?"

Response: As I said in my testimony, the Robbins matter was presented to me as administrative litigation. When press reports long after the settlement was concluded indicated there was a RICO case pending between the parties, I asked why that had not been dismissed as part of the settlement to protect the BLM employees who were the target of the RICO claims. I was told that an effort had been made to settle the RICO case but that neither the U.S. Attorney's office nor Mr. Robbins wanted to settle that case because both sides believed strongly that they would prevail in court.

B. Were you made aware of the U.S. Attorney's concerns that the proposed Robbins settlement would make it difficult for federal prosecutors to prosecute

grazing law violations throughout Wyoming? If so, what was your response?

Response: No, I do not recall being made aware of the U.S. Attorney's concerns.

6. In your *Denver University Law Review* article, you wrote:

> **"[T]he Supreme Court has started to retreat from the generalized right of privacy set forth in the *Griswold* and *Roe v. Wade* cases, thus affirming a need to base decisions in a neutral reading of the Constitution without substituting the personal moral values of the justices. In the *Bowers v. Hardwick* decision, Justice White wrote for the majority stating '[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.'"**

In essence, you wrote that *Griswold* and *Roe* are based on the "personal moral values of the justices" while *Bowers* was based on "a neutral reading of the Constitution." Do you continue to subscribe to this view? Please explain.

Response: *Griswold* is the bedrock decision of the Supreme Court's right of privacy jurisprudence, and I consider it and *Roe* to be well-settled law. As for the *Bowers* decision, it was, I believe, the latest pronouncement of the Supreme Court on privacy at the time that I wrote that article in 1988. *Bowers* was recently overruled. If confirmed, I would follow the current precedent of the Supreme Court on all matters related to the right of privacy.

7. In your *Denver University Law Review* article, you also stated: "Bork wrote that the Warren Court had caused great harm to the prestige of the law by confusing the theory of law with the power which the court held and used to produce the results it liked without any anchor in the Constitution or statutes." You expressed support for Bork's philosophy in this article. Please describe specific cases of the Warren Court that you believe harmed the prestige of the law.

Response: The quoted passage was a statement of Judge Bork's opinion of the Warren Court; it was not a statement of my opinion of the Warren Court.

8. In January 1994 you wrote a letter to the editor of the *Washington Post* in which you criticized the Clinton Administration's plan to reintroduce wolves into Yellowstone National Park. You wrote that "the wolf is a skillful predator and will destroy the assets of these small businesses, namely, the livestock of the ranchers." Recent press reports indicate that wolf reintroduction has had a beneficial impact on the health and ecosystem of Yellowstone, one of our most beloved national parks. Do you stand by the position you took on this issue in 1994 or has your position changed? Please explain.

Response: I wrote the letter to express the views of my employers at the time on the subject of wolf reintroduction – a view that was excluded from the original story in the Washington Post. The wolf has shown itself to be an amazing predator. The wolves' intelligence, cunning,

strength, endurance and survival skills have been evident. Wolf packs have ranged far within and outside Yellowstone in search of prey and new territory. Some of this new prey has included livestock. Some of this new territory has included neighboring ranches.

9. When you were the Interior Solicitor, you issued a legal opinion on the matter of retiring grazing permits, and you also issued a clarification. In the opinion, you stated that grazing permits could not be retired on land that was still "chiefly valuable for grazing." In your clarification, you stated that this test would no longer apply but that it would be the presumption of the Secretary of Interior that grazing should continue. In developing your opinion, it is alleged that you met far more frequently with industry than with environmental groups. For example, you met with the Arizona Cattle Growers Association, California Cattlemen's Association, Wyoming Stock Growers Association, and National Cattlemen's Beef Association.

During your nomination to be Interior Solicitor, you told Senator Wyden: "Problem solving is the essence of good lawyering. I have no doubt that I will regularly meet with persons and groups engaged in fundamental disagreements." You also assured the Senate Energy and Natural Resources Committee in oral testimony that "[The Secretary of the Interior] has told you and the public she fully intends to involve State and local communities in her decision process. I am sure that is where we will end up."

A. Prior to the development of your legal opinion or clarification on retiring grazing permits, did you meet with any anti-grazing groups? If so, which ones and how many meetings did you have.

Response: Yes. I met once or twice with a representative of the Center for the New West, in addition to phone calls. I also would like to clarify that cattle industry representatives did not participate in the development of my opinion.

B. Did you ever meet with the Grand Canyon Trust, a group that invested $1.5 million into purchasing grazing permits from willing sellers in an effort to permanently retire grazing permits? If so, how many meetings were there?

Response: Yes. A representative of the Grand Canyon Trust met with me once prior to issuance of my opinion. That meeting was followed with correspondence between us in which the representative essentially agreed with the legal analysis contained in my opinion.

C. Did you ever meet with Friends of the Earth, Natural Resources Defense Council, Earth Justice, the Wilderness Society, the National Public Lands Grazing Campaign, other environmental groups, or with any states and localities that supported retiring grazing permits? If so, how many meetings were there?

Response: No.

D. The retirement of grazing permits has bipartisan support. Representative

Chris Cannon (R-Utah) has praised the Grand Canyon Trust's effort: "This project is a good example of the way we can work together to benefit the community and the land . . . buyouts give ranchers the cash they need to retire debt and purchase grazing permits in less environmentally sensitive areas." Representative Jim Matheson (D-Utah) has stated that "the permits involve a willing buyer and a willing seller. I am a free-market kind of guy." Mr. Myers, you do not appear to be a "free-market kind of guy" on this issue. Please explain why not, given the level of bipartisan support for this program.

Response: My opinion was solely based on my reading the law and had nothing to do with policy considerations. The Department of the Interior has never recognized a property right in a grazing permit. Courts have uniformly agreed. Therefore, a permittee's sale of his interest in grazing privileges to a non-governmental organization cannot abrogate the BLM's authority to issue or renew permits in accordance with statutory and regulatory requirements. I found that Congress intended that once the Secretary established a grazing district under the Taylor Grazing Act, the primary use of that land would be grazing. *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1308 (10th Cir. 1999), *aff'd on other grounds*, 529 U.S. 728 (2000). As Solicitor, I did not have authority to contravene these well-established principles of public land law, regardless of my or anyone else's policy views.

10. You have been critical of the Endangered Species Act. In a speech to the Nevada Cattlemen's Association during your tenure as Solicitor, you stated, "We should not be using the Endangered Species Act ... as a land management tool." Your hometown paper, the *Idaho Statesman*, opined, "[I]t's naïve, and downright misleading, to suggest that the Endangered Species Act has no effect on land management."

An organization called the Defenders of Wildlife reviewed some 120 federal court decisions resolving Endangered Species Act issues between January 21, 2001, and October 31, 2003, in which the Bush Administration exerted influence over legal strategy and outcome. You were Solicitor for 52 of the 58 months of this review. According to the review, the Bush Administration made arguments that are hostile or damaging to the effectiveness of the Endangered Species Act in 63% of the cases, and in 89% of those cases, "courts found that the administration had acted illegally and ruled against them." In one case, the court criticized the Department of the Interior for its "dismissive attitude toward the Endangered Species Act in general, and designation of critical habitat in particular."

A. What is your response to the Defenders of Wildlife review?

Response: I have not seen the review and thus cannot respond to it. Presumably the cases involved various federal agencies, including the Departments of the Interior, Commerce, Defense, Agriculture, and perhaps a number of others. I cannot comment on the one Department of the Interior case because I do not know what case that is. I have committed to follow the precedent of the Supreme Court and the Ninth Circuit in endangered species cases. As to the opinion of the Idaho Statesman, the newspaper did not have a reporter present when I delivered my speech. In a letter to the editor, I pointed out the hearsay nature of the paper's reporting (and

companion editorial). I illustrated my point by repeating my comments at the event supporting a recent decision of the Ninth Circuit in an Endangered Species Act case.

B. If you were confirmed, would you be willing to recuse yourself in all cases involving the Endangered Species Act?

Response: If confirmed, I would follow the relevant statutes and Code of Judicial Conduct to determine disqualification, as I discussed in my response to question 2.

11. Mr. Myers, in the Inspector General's report regarding alleged inappropriate contacts between you and your former clients, there is an entry regarding a meeting you had with a rancher who operates on the border between Oregon and California. This rancher was an acquaintance of yours from your work with the Public Lands Council. The IG's report, based on interviews, states: "When Myers was interviewed, he stated that he knew the father from the PLC and that he came in with his son to visit. Myers stated that they primarily discussed issues involving the Klamath River Basin and the Middle Rio Grande Valley in New Mexico. Myers noted that neither of these issues were in existence at the time he was employed by H&H [Holland and Hart], and he had therefore 'never heard of' either before arriving at DOI."

You gave different testimony about the Klamath River Basin, however, during your nomination hearing to be Interior Solicitor in 2001. In a response to Senator Smith regarding water rights and the Endangered Species Act, you testified: "I want you to know that I know what you are talking about, I have seen it, and I have friends who are in the Klamath Basin, and so I appreciate your raising it."

Please explain why – after acknowledging your familiarity of the Klamath Basin issue and the tension between ranchers' desire to use the water and the value in protecting endangered species, and indeed after stating your interest in being involved in the issue – you told the Interior IG that you had "never heard of" this issue before arriving at Interior?

Response: While in private practice, no client asked me to represent him or her in matters related to Klamath Basin and I was unfamiliar with the dispute. Shortly before my hearing on my nomination to be Solicitor, I arrived at the Department of the Interior for a briefing on issues pending in the Department that might be of interest to Senators on the committee. The briefing included Klamath Basin issues. Before arriving at the Department for that briefing, I had not heard of these issues. That briefing was when I learned about the issues and why I was able to tell Senator Smith that I knew what he was talking about. I had seen the briefing material and I realized I knew some of his constituents who ranched in the area. My discussion with the IG's office about this issue was consistent with the answer provided here.

12. In private practice, have you ever represented an environmental organization or Indian tribe in litigation against the grazing or mining industry, or lobbied for environmental or Native American organizations on an issue or piece of legislation that was

opposed by the mining or grazing industries? Please explain.

Response: I have not represented environmental organizations in private practice. However, I have represented Native American tribal interests in pursuit of environmental matters unrelated to grazing or mining. In particular, I have represented tribal interests in securing water rights and damages for lost fishing rights. I have not lobbied for environmental or Native American organizations. While in private practice, I volunteered to chair a review commissioned by the State of Idaho regarding management of federal lands in Idaho. Environmental interests participated in that effort. Specific environmental groups were invited to join the group as full members but they declined to do so.

William G. Myers III

Boise, Idaho

March 18, 2004

Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch:

Please find attached to this letter my answers to follow-up written questions from Senator Kennedy regarding my nomination to the Ninth Circuit Court of Appeals.

Sincerely,

William G. Myers III

cc: Honorable Patrick J. Leahy

Attachment

Answers to Follow-up Written Questions of Senator Kennedy
to William Myers, Nominee to the Ninth Circuit Court of Appeals

Thank you for your answers to my written questions. As noted below, some of those answers are incomplete and/or raise additional issues. Accordingly, I ask that you please provide the following information:

1. **In questions 3.E. of my prior written questions to you, I asked you to "state in detail the specific information you received from [the Bureau of Land Management] about the tribe's concerns regarding the Glamis Imperial Gold Mine, . . . "whether you considered that information in drafting your opinion, and how it was relevant to your decision." In response, you identified only the sources of that information, but not its substance, relevance, or whether you considered it in drafting your October 2001 opinion. Please provide a complete answer to question 3.E.**

Response: I appreciate this opportunity to clarify my answers to your questions.

The BLM did not convey to me the Tribe's concerns about the project. Rather, I learned about the Tribe's concerns from correspondence received from the Tribe's attorney and from career attorneys in my office's Division of Indian Affairs and Division of Mineral Resources. The Tribe's attorney wrote a letter to me dated August 31, 2001. In the letter, the attorney discussed her clients, consultations with the Department regarding the mining proposal, and pending litigation in which the Tribe had filed for intervention. In addition, attorneys in my office discussed with me the Tribe's concerns. The information they provided was consistent with the tribal attorney's letter and more detailed, such as discussion of the Trail of Dreams and Running Man. The information from both the tribal attorney and staff attorneys was relevant to my understanding of the history and context of the matter and previous actions of the Department. I considered that information prior to formulating my opinion on this matter.

After I had issued my opinion, the tribal attorney and tribal leaders came to Washington, DC where other officials and I met with them to discuss the mine proposal. The tribal attorney gave a power point presentation and we discussed issues related to the mine.

2. **In your response to my previous written questions, you stated that you "were under the impression that the Department of the Interior was fulfilling its ongoing consultation obligations to the Tribe through contacts with departmental officials," and that "the Tribe's [August 2001] letter . . . and filings in pending litigation provided . . . sufficient information about the Tribe's views." Didn't you have a duty to ensure that the Department of the Interior complied with obligations of government to government consultation with the Quechan Tribe, rather than just having an impression that these obligations were met? Please state in detail your understanding of the Department of Interior's obligation to consult with Native American tribes and explain the basis for your belief that these obligations were**

satisfied with regard to you October 2001 opinion and the rescission of the Department's December 1999 opinion regarding the Glamis Imperial Gold Mine project.

Response: My opinion, as it related to the Glamis mine proposal, focused on a narrow legal question of statutory interpretation of section 601(f) of FLPMA. My opinion was advice to the Secretary regarding the legal parameters within which the Department could make policy in consultation with the Tribe. Executive Order 13175 details the Department's obligation to consult with tribes on policies that have tribal implications. Because I understood from the tribal attorney's letter and from staff attorneys that the Department had been consulting and was continuing to consult with the Tribe through contacts that pre-dated my arrival at the Department, I believed that the Department was complying with its obligations under the Executive Order.

3. **In question 2.C. of my initial written questions, I asked you about your delay of several months in responding to a request by the Quechan Tribe to meet with you regarding the Glamis Imperial Gold Mine project. In response to that question, you noted that "a number of letters from other tribes [besides the Quechan Tribe] arrived in the Department on the same subject," and "[t]he draft response was held and revised to address these other letters as well."**

   A. **It is my understanding that most of the letters from other tribes to which you refer were received in your office during the fall of 2001, several months before your reply to the Quechan Tribe. Is it your position that the letters from other tribes somehow contributed to your delay in responding? If so, how?**

Response: Letters from other tribes arrived after the letter from the Quechan Tribe arrived in early September of 2001. Staff attorneys took the time to make sure that the response to the Quechan Tribe was consistent with the response to these later tribal letters on the same subject. As I indicated previously, I signed my letter to the Quechan Tribe shortly after it was presented to me by staff for review and signature.

   B. **Which other tribes wrote to you about the Glamis Imperial Gold Mine project, and did you meet with them or otherwise respond to their letters? If so, please explain in detail how you responded. If not, please explain why you decided it was unnecessary to do so. In addition, please explain how the Department of Interior satisfied its obligations to engage in government to government consultation with the Colorado River tribes besides the Quechan Tribe that were affected by the Glamis Imperial Gold Mine project.**

Response: I do not recall which other tribes wrote to me about the Glamis project. I did not meet with them but I do recall responding to their letters. As suggested by my response to Question 3, I received from staff a set of letters for my signature to these other tribes, the content

of which should have been consistent with my letter to the Quechan Tribe. In my letter to the Quechan Tribe's attorney, I thanked her for her letter and the views of the Tribe. I summarized my interpretation of FLPMA Section 601(f) and the Secretary's decision to reconsider the proposed plan of operations submitted by the mining company and any comments the Tribe might have on the proposed plan. I thanked her for the invitation to California and I apologized for the delay in responding. I do not recall how the Department consulted with the Colorado River tribes. If these tribes were among the tribes that wrote to me, then they should have received my reply correspondence.

SUBMISSIONS FOR THE RECORD

ADVOCATES FOR THE WEST
AMERICAN RIVERS
AMERICANS FOR DEMOCRATIC ACTION
ALLIANCE FOR JUSTICE
CLEAN WATER ACTION
COMMITTEE FOR JUDICIAL INDEPENDENCE
COMMUNITY RIGHTS COUNSEL
DEFENDERS OF WILDLIFE
EARTHJUSTICE
ENDANGERED SPECIES COALITION
FRIENDS OF THE EARTH
LEADERSHIP CONFERENCE ON CIVIL RIGHTS
MINERAL POLICY CENTER
NARAL PRO-CHOICE AMERICA
NATIONAL ABORTION FEDERATION
NATIONAL ENVIRONMENTAL TRUST
NATIONAL ORGANIZATION FOR WOMEN
NATURAL RESOURCES DEFENSE COUNCIL
THE OCEAN CONSERVANCY
PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY
PEOPLE FOR THE AMERICAN WAY
SIERRA CLUB
THE WILDERNESS SOCIETY

October 14, 2003

The Honorable Orrin Hatch
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
United States Senate
Washington, DC 20510

RE: Nomination of William G. Myers III to the Ninth Circuit Court of Appeals

Dear Chairman Hatch and Ranking Member Leahy:

The undersigned organizations, representing countless Americans in the Ninth Circuit and across the country, urge you to consider our views on the nomination of William G. Myers III, who recently resigned his post as Interior Department Solicitor, to a lifetime position on the U.S. Court of Appeals for the Ninth Circuit. Specifically, we urge the Senate Judiciary Committee not to schedule a hearing on this nomination until the issues raised by all relevant investigations into alleged ethical improprieties by Myers and his office, including two concurrent inquiries by the Department of the Interior's Inspector General, are completely resolved.

Myers' record must be carefully scrutinized by this committee, particularly because a substantial minority of the American Bar Association—six or seven of the ABA committee's fifteen members—rated Myers "not qualified" for the job. Not a single member of the committee rated Myers "well qualified." This fits a disturbing pattern—four of the last six appellate court nominees rated by the ABA received a split Q/NQ rating.

Scrutiny of Myers' record cannot meaningfully take place until the conclusion of all investigations into the ethical questions with respect to Myers' conduct as Solicitor. This would seem to go without saying, but we note that this Committee has scheduled a hearing on the nomination of Mike Fisher to the U.S. Court of Appeals for the Third Circuit, even though Fisher was recently found by a federal court jury to have violated the federal civil rights of Pennsylvania state employees. The jury awarded $220,000 in damages against him. The Committee simply should not hold hearings on the nomination of individuals whose records remain under such serious ongoing ethical clouds.

Myers' Contacts with Former Clients

Inspector General Earl Devaney has opened an investigation into whether Myers violated his recusal agreement by holding a number of meetings with former clients during the restricted period. Here is a summary of the relevant facts: Prior to his confirmation as Interior Department Solicitor, Myers entered into an agreement that prohibited him from participating "in any particular matter involving specific parties in which [he knows] that [his former law firm] Holland & Hart, LLP, is a party or represents a party."[1] The agreement took effect upon his confirmation by the U.S. Senate—July 12, 2001—and remained in effect until July 12, 2002. In addition to this one-year ban, Myers agreed to an open-ended ban on substantial participation in any matter or case that he handled at Holland & Hart.

Notwithstanding this ban, there is evidence, obtained through a FOIA request, that Myers directly participated in deliberations that led the Interior Department to give notice, on March 3, 2003, that it was considering revising the very grazing regulations that had been implemented by the Clinton Administration and upheld by the Supreme Court in *Public Lands Council v. Babbitt*.[2] As director of Public Lands Council,[3] and then at Holland & Hart,[4] Myers was involved in challenging these regulations in court. As director of PLC, Myers advocated vigorously against these regulations.[5] At Holland & Hart he was a registered lobbyist for the

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[1] Recusal Letter, William Myers to Wendell K. Sutton, (May 1, 2001).

[2] Documents obtained through the Freedom of Information Act (FOIA) by Friends of the Earth indicate that Myers met with cattle interests and members of his former law firm at least seven times in the fall of 2001 and summer of 2002 in his first year in the post. Immediately after the one-year recusal period expired, Myers' calendar indicates repeated meetings with grazing interests, including meetings concerning potential changes to the Department's current grazing regulations.

[3] Public Lands Council v. Babbitt, 929 F. Supp. 1436 (D. Wyo. 1996).

[4] As counsel with Holland & Hart, Myers authored an amicus brief with the Supreme Court opposing the regulations on behalf of a number of farm credit institutions. *See* Brief of Amici Curiae Farm Credit Institutions in Support of Petitioners, Public Lands Council v. Babbitt, 529 U.S. 728 (2000), *available at* 1999 WL 1128263.

[5] *See, e.g.,* Testimony of William G. Myers III before the Subcommittee on Livestock, Dairy, and Poultry of the House Committee on Agriculture, Sept. 17, 1997.

PLC and National Cattlemen's Beef Association. The Inspector General's office must have time to conduct a thorough investigation to resolve these troubling questions prior to Committee consideration of Myers' appointment to the bench.

The Robbins Grazing Settlement

The Inspector General is also currently investigating whether Myers' office negotiated an illegal settlement agreement between the Bureau of Land Management (BLM) and H. Frank Robbins, Jr., a Wyoming rancher with a long history of range violations and clashes with the BLM. As reported in the press, "the deal is highly unusual within the BLM and appears to depart from long-running requirements spelled out in federal law about who can receive grazing permits."[6] Calendar records obtained by Friends of the Earth note Myers' personal attention to the agreement.

Serious concerns about the legality of this settlement have been raised by both BLM employees[7] and the Bush-appointed U.S. Attorney for the District of Wyoming.[8] As explained in a letter from U.S. Attorney Matthew Mead to an Assistant Interior Solicitor, the agreement's special treatment of Robbins could undermine efforts to enforce rangeland protections against other public lands ranchers throughout Wyoming. "What justification," Mead asks, "is there for prosecuting all permittees other than Robbins for the same conduct?"[9] PEER's analysis of the settlement details seven ways in which the agreement violates federal laws and regulations—among them, illegally ceding a public easement; granting Robbins "additional management flexibility" over certain grazing allotments; conditionally awarding Robbins a new grazing permit; and extending preferential treatment in enforcement decisions.[10]

Myers bears oversight responsibility for agreements negotiated by his office, especially an agreement such as this that sets new and disturbing precedents for public lands. His calendar records suggest that he specifically authorized this settlement. The Inspector General's and other investigations into this settlement agreement could answer serious questions about Myers' involvement and should be completed before further consideration of his nomination to the Ninth Circuit.

Conclusion

The Ninth Circuit acts as the court of last resort for almost all federal cases arising from Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. An important part of its caseload includes deciding the fate of federal environmental and other

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[6] Mike Stark, *BLM, Rancher Settle Grazing Dispute*, BILLINGS GAZETTE, June 13, 2003.
[7] According to published reports, an internal BLM memo documents at length the ways the settlement agreement grants Robbins preferential treatment that potentially violates sections of the Taylor Grazing Act, the Federal Land Policy and Management Act, and the Federal Advisory Committee Act, as well as federal regulations. *Id.*
[8] Letter from Matthew H. Mead, US Attorney, District of Wyoming to John R. Kunz, Assistant Regional Solicitor, Department of the Interior, August 28, 2002.
[9] *Id.*
[10] PEER, Violations of Law Sanctioned within the H. Frank Robbins and Bureau of Land Management Settlement Agreement (2003).

safeguards. The people of these states deserve federal appellate judges whose fairness and integrity are beyond question. Consideration of Myers' nomination must await completion of all ongoing investigations into Myers' conduct.

Sincerely,

Laird J. Lucas
Executive Director
Advocates for the West

S. Elizabeth Birnbaum
Director of Government Affairs
American Rivers

Amy Isaacs
National Director
Americans for Democratic Action

Nan Aron
President
Alliance for Justice

Paul Schwartz
National Campaigns Director
Clean Water Action

Susan Lerner
Chair
Committee for Judicial Independence

Doug Kendall
Executive Director
Community Rights Counsel

William Snape
VP for Litigation
Defenders of Wildlife

Vawter Parker
Executive Director
Earthjustice

Beth Lowell
Policy Director
Endangered Species Coalition

Sara Zdeb
Legislative Director
Friends of the Earth

Wade Henderson
Executive Director
Leadership Conference on Civil Rights

Lexi Shultz
Legislative Director
Mineral Policy Center

Kate Michelman
President
NARAL Pro-Choice America

Vicki Saporta
President & CEO
National Abortion Federation

Philip E. Clapp
President
National Environmental Trust

Kim Gandy
President
National Organization for Women

Gregory Wetstone
Director of Advocacy
Natural Resources Defense Council

Julia Hathaway
Director of Legislative Affairs
The Ocean Conservancy

Jeff Ruch
Executive Director
Public Employees for Environmental Responsibility (PEER)

Ralph G. Neas
President
People for the American Way

Pat Gallagher
Director, Environmental Law Program
Sierra Club

Leslie Jones
Deputy General Counsel
The Wilderness Society

CC: Members, Senate Committee on the Judiciary

ALLIANCE FOR JUSTICE * AMERICAN ASSOCIATION OF UNIVERSITY WOMEN * CATHOLICS FOR A FREE CHOICE * FEMINIST MAJORITY * HUMAN RIGHTS CAMPAIGN * NARAL PRO-CHOICE AMERICA * NATIONAL ABORTION FEDERATION * NATIONAL COUNCIL OF JEWISH WOMEN * NATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH ASSOCIATION *NOW LEGAL DEFENSE AND EDUCATION FUND * NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES * NATIONAL WOMEN'S LAW CENTER * PLANNED PARENTHOOD FEDERATION OF AMERICA * RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE * SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE UNITED STATES

January 29, 2004

Dear Senator:

We, the undersigned women's, reproductive rights and human rights organizations, write to express our concern about the nomination of William G. Myers to the Ninth Circuit Court of Appeals. We ask you to carefully explore his views of the constitutional right to privacy at his upcoming hearing and to seek firm assurances that he will not use a lifetime appointment to the Ninth Circuit to further roll back the right to privacy and a woman's right to choose.

Several of Myers' statements and positions raise serious concerns. He appears to fit the troubling pattern we have seen from the Bush administration of nominating individuals who hold extremely narrow views of personal constitutional rights, especially the constitutional right to privacy, while holding elevated views of property rights and states' rights.

Since most of Myers' legal career has involved environmental and land use issues, he has not often had occasion to express publicly his views on privacy. In two articles defending Robert Bork's nomination to the U.S. Supreme Court, however, Myers endorses an extremely narrow view of unenumerated rights in general and the right to privacy in particular. Of particular concern is a passage in which Myers argues that *Griswold v. Connecticut* and *Roe v. Wade* are based on the "personal moral values of the justices" while *Bowers v. Hardwick* was based on "a neutral reading of the Constitution." (*Griswold* and *Roe*, of course, have stood the test of time, while *Bowers* was overruled last June in *Lawrence v. Texas*.) Myers wrote:

> "There are indications that the Supreme Court has started to retreat from the generalized right of privacy set forth in the *Griswold* and *Roe v. Wade* cases, thus affirming a need to base decisions in a neutral reading of the Constitution without substituting the personal moral values of the justices. In the *Bowers v. Hardwick* decision, Justice White wrote for the majority stating '[t]he Court is

> most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.' . . . . Whenever the Supreme Court departs from the laws, as embodied by the Constitution and the statutes, and supplants the individual morals of the justices to furnish a remedy because that justice merely "exists," then the laws no longer form the basis for the remedy and the judiciary has become a government of men."[1]

The passage quite clearly shows that, at least at the time of the writing, Myers believed that *Griswold* and *Roe* have no grounding in the Constitution and are therefore illegitimate. At his hearing, recently noticed for this coming Wednesday, February 4, we urge that Myers be questioned about the meaning of this passage and whether he continues to subscribe to these views. Further, we urge that Myers be questioned about his views on *Lawrence*, since this decision overturned *Bowers*. The views expressed in this article, if not repudiated, would place Myers far outside the mainstream of Constitutional jurisprudence.

Judge Bork was rejected for a lifetime appointment to the U.S. Supreme Court because a bipartisan majority of senators determined that his judicial philosophy was outside the mainstream. For example, Judge Bork's record showed that he believed that there is no constitutional right to privacy, that even *Griswold*, which holds that married people have a right to contraception, is "an unprincipled decision" and that there should be no heightened scrutiny for gender discrimination under the constitution's equal protection clause. Myers, however, disagreed with the Senate's assessment and wrote, "Judge Bork's judicial philosophy was well within the parameters of acceptable constitutional theory, worthy of representation on the Supreme Court."[2] Myers should be questioned about whether he continues to believe that Bork's judicial philosophy is appropriate for a Supreme Court justice or a lower court judge.

We believe that the Senate Judiciary Committee should seek assurances from every nominee that he or she poses no risk of rolling back constitutional and civil rights – including the right to choose. Those who would turn back the clock on the rights of women, the lesbian, gay, bisexual, and transgender community and others whose lives have been saved or enhanced by constitutional and civil rights, may object. Nonetheless, for the Senate to properly discharge its constitutional duty of advice and consent, it must seek assurances that nominees to lifetime judicial appointments fully support the constitutional right to privacy. Seeking such assurances is especially

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[1] William G. Myers III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 Denver U. L. Rev. 1, 24-25 (1988); see also, William G. Myers III, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork*, 17 Hastings Const. L.Q. 399 (1989-1990).

[2] 66 Denver U. L. Rev. at 25.

appropriate in circumstance like these, when the nominee's record raises a genuine question of his or her understanding of the right to privacy.

We hope you will attend the Senate Judiciary Committee hearing on this nomination next week and will raise these issues with the nominee. Thank you for your consideration.

Sincerely,

Nan Aron
President
Alliance for Justice

Jacqueline E. Woods
Executive Director
American Association of University Women

Frances Kissling
President
Catholics for a Free Choice

Eleanor Smeal
President
Feminist Majority

Cheryl Jacques
President
Human Rights Campaign

Kate Michelman
President
NARAL Pro-Choice America

Vicki Saporta
President & CEO
National Abortion Federation

Marsha Atkind
President
National Council of Jewish Women

Judith M. DeSarno
President and CEO
National Family Planning and Reproductive Health Association

Kathy Rodgers
President
NOW Legal Defense and Education Fund

Judith L. Lichtman
President
National Partnership for Women and Families

Marcia Greenberger
Co-President
National Women's Law Center

Gloria Feldt
President
Planned Parenthood Federation of America

Rev. Carlton W. Veazey
President and CEO
Religious Coalition for Reproductive Choice

Tamara Kreinin
President and CEO
Sexuality Information and Education Council of the United States (SIECUS)

BEAR RIVER BAND of ROHNERVILLE RANCHERIA
32 BEAR RIVER DR. LOLETA, CA 95551 707.733.1900, fax 733.1972

February 2, 2004

The Honorable Patrick J. Leahy
152 Senate Dirksen Office Building
Washington, D.C. 20510

Via Fax: (202) 224-9516

Re: Opposition to Nomination of William G. Myers III to the 9th Circuit Court of Appeals

Dear Senator Leahy:

On behalf of the Bear River Band of Rohnerville Rancheria Tribe, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people and other Colorado River tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with Quechan Indian Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review or citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed-door meetings in which Glamis Gold, the applicant, and the National Mining Association, its trade group, were granted extensive and exclusive access to the decision makers and their counsel prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

Mr. Myers' nomination is of great concern for several reasons:

1. Mr. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal governments grounded in the United States Constitution, federal statutes, adopted policy statements and trust responsibility.
2. As DOI Solicitor, it was his duty to advise DOI to consult with the tribe. The ability to understand these complex issues is particularly important for lifetime judicial seat that encompasses nine western states and territories including California, scores of Indian reservations and lands, well over a hundred Indian tribes, millions of Indian people and important federal and tribal lands management issues.
3. Mr. Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage and sacred places.
4. As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contacts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

For these reasons, the Bear River Band of Rohnerville Rancheria Tribe respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California Indian tribes be invited to provide testimony on this important matter.

Sincerely,

Janice McGinnis
Tribal Vice-Chairperson

Cc: California Nations Indian Gaming Association
Quechan Indian Nation



January 27, 2004

The Honorable Patrick Leahy
United States Senate Judiciary Committee
Dirksen Senate Office Bldg. #152
Washington, DC 20510 Fax: (202) 224-9516

Re: OPPOSITION to Nomination of William G Myers III to the 9th Circuit Court of Appeals

Dear Senator Leahy:

On behalf of the Cabazon Band of Mission Indians, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people and other Colorado River tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review or citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed-door meetings in which Glamis Gold, the applicant, and the National Mining Association, its trade group, was granted extensive and exclusive access to the decision makers and their counsel prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

84-245 INDIO SPRINGS DRIVE ◻ INDIO, CALIFORNIA 92203-3499 ◻ (760) 342-2593 ◻ FAX (760) 347-7880

Mr. Myers' nomination is of great concern for several reasons:

1. Mr. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal governments grounded in the United States Constitution, federal statutes, adopted policy statements and trust responsibility.

2. As DOI Solicitor, it was his duty to advise DOI to consult with the tribe. The ability to understand these complex issues is particularly important for a lifetime judicial seat that encompasses nine western states and territories including California, scores of Indian reservations and lands, well over a hundred Indian tribes, millions of Indian people and important federal and tribal lands management issues.

3. Mr. Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage and sacred places.

4. As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contacts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

For these reasons, the Cabazon tribe respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California Indian tribes be invited to provide testimony on this important matter.

Sincerely,

John A. James
Tribal Chairman
Cabazon Band of Mission Indians

cc: California Nations Indian Gaming Association
Quechan Indian Nation

JAJ/dm

COLUSA INDIAN COMMUNITY COUNCIL
CACHIL DEHE BAND OF WINTUN INDIANS

January 29, 2004

The Honorable Patrick J. Leaby
U.S Senate Judiciary Committee
152 Senate Dirksen Office Building
Washington, D.C. 20510
Fax: 202-224-9516

Re: OPPOSITION to Nomination of William G. Myers III to the 9th Circuit Court of Appeals

Dear Senator Leaby,

On behalf of the Cachil DeHe Band of Wintun Indians, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal scared place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people and other Colorado River Tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review or citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed door meetings in which Glamis Gold, the applicant, and the National Mining Association, its trade group were granted extensive and exclusive access to the decision makers and their course prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

Mr. Myers' nomination is of great concern for several reasons.

1. Mr. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal

3730 Highway 45. Colusa CA 95932 Phone: (530) 458-8231 Fax: (530) 458-4186

governments grounded in the United States Constitution, federal statutes, adopted policy statements and trust responsibility.

2. As DOI Solicitor, it was his duty to advise DOI to consult with the tribe. The ability to understand these complex issues is particularly important for a lifetime judicial seat that encompasses nine western states and territories including California, scores of Indian reservations and Indian lands management issues.

3. Mr. Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage and scared places.

4. As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contracts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

For these reasons, the Cachil DeHe Band of Wintun Indians respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian Tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California Indian Tribes be invited to provide testimony on this important matter.

Sincerely,

Wayne R. Mitchum
Cachil DeHe Band of Wintun Indians

Cc: California Nations Indian Gaming Associations
Quechan Indian Nation

CALIFORNIA
NATIONS
INDIAN GAMING
ASSOCIATION

1215 K Street
Suite 1020
Sacramento, CA
95814

phone 916-448-8706
fax 916-448-8758
www.cniga.com

October 24, 2003

Hon. Orrin G. Hatch, Chair
Hon. Patrick J. Leahy, Ranking Member
Senate Judiciary Committee
Dirksen Building Room 224 FAX: 202.224.9102
Washington, DC 20510

Re: OPPOSITION to Nomination of William G. Myers III to the 9th Circuit Court of Appeals

Hon. Chair, Ranking Member, Senators Feinstein and Kyl and Judiciary Committee:

This letter is on behalf of the California Nations Indian Gaming Association (CNIGA) member tribal nations, a non-profit organization of 57 federally-recognized tribal governments.

We oppose the confirmation of William G. Myers III to the 9th Circuit federal bench. Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass and was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely ignored the rights and interests of the Quechan people and other Colorado River tribes.

In deciding to rescind the denial of the mine, neither Secretary Norton nor Solicitor Myers' offices, unlike their predecessors, engaged in government-to-government consultation with the Quechan Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review or citizen process.

Those offices did, however, hold closed-door meetings in which Glamis Gold, the applicant, and the National Mining Association, its trade group, were granted extensive and exclusive access to the decision makers and their counsel prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

Mr. Myers' nomination is of great concern for several reasons:

- Mr. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal governments grounded in the United States Constitution, federal statutes, adopted policy statements and trust responsibility.

- As DOI Solicitor, it was his duty to advise DOI to consult with the tribe, a duty which he either incompetently understood or intentionally ignored. The ability to understand these complex issues is particularly important for a lifetime judicial seat that encompasses nine western states and territories including California, scores of reservations, well over a hundred Indian tribes, millions of Indian people and important federal and tribal lands management issues.

- Mr. Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage and sacred places, an outcome that is simply unacceptable to California tribes and reveals an activist point of view that wholly disrespects tribal values that should not be reflected on the federal bench.

- As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contacts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

For these reasons, CNIGA respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers for this important lifetime appointment. We also respectfully ask that CNIGA be notified prior to the date of confirmation hearings, should they be scheduled, so that California tribes may attend. Finally, we ask that a representative of California tribes be invited to provide testimony on this important matter.

Letter unanimously approved October 23, 2003 by CNIGA, and signed by authorized tribal signators.

Big Sandy Rancheria

Cabazon Band of Mission Indians

Chemehuevi Indian Tribe

Coyote Valley Band of Pomo Indians

Greenville Rancheria

Los Coyotes Band of Indians

Mesa Grande Band of Mission Indians

Mooretown Rancheria

Morongo Band of Mission Indians

Pechanga Band of Luiseño Indians

Redding Rancheria

Redwood Valley Little River Band of Pomo Indians

Smith River Rancheria

Table Mountain Rancheria

Tule River Indian Reservation

Cc: Hon. Barbara Boxer, CA Senator
Hon. John McCain, AZ Senator

February 3, 2004

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Leahy,

We, the undersigned civil rights, disability rights, senior citizens, women's rights, human rights, Native American, planning and environmental organizations, are writing to express our strong opposition to the confirmation of William G. Myers III to a lifetime seat on the United States Court of Appeals for the Ninth Circuit. Mr. Myers has neither obtained the qualifications necessary to serve on the Ninth Circuit nor demonstrated the ability to be fair and impartial as an appellate judge. He has devoted his career to advancing the interests of grazing and mining industries at the expense of the environment and the rights of Native Americans and tribal governments. His pursuit of that agenda continued unabated during his tenure on the public payroll as Solicitor of the Department of the Interior. His writings, public statements and legal work also reveal radical views on property rights, individual rights, and federal government authority—views that broadly threaten basic safeguards that are of critical concern to the millions of members represented by our organizations.

Mr. Myers lacks the qualifications necessary to serve on the Ninth Circuit. More than one-third of the panel of the American Bar Association's Standing Committee on the Federal Judiciary rejected Mr. Myers as "unqualified" for the bench, while not one considered him "well-qualified" for the position. Mr. Myers does not have significant litigation experience at either the trial or appellate level, and has not generated any important legal scholarship. In more than two years as Solicitor of the Interior Department, he produced just two formal legal opinions and one "correction" of his second opinion. By contrast, his predecessor produced 28 formal opinions during an eight-year tenure.

Even more troubling than what his record lacks is what it contains. As the Interior Department's chief lawyer, Mr. Myers regularly favored the interests of the mining and grazing industries over the rights of American Indian tribal governments, Native Americans, and the environment. One of his two formal solicitor opinions reversed a detailed opinion by his predecessor in order to pave the way for Secretary Gale Norton to reverse the decision of former Secretary Bruce Babbitt and allow reconsideration of Glamis Gold's proposed cyanide heap-leach gold mine in the Imperial Valley of California on lands sacred to the Quechan Indian Nation and other Colorado River Tribes. A recent federal court decision rejected the result that

Mr. Myers' reached and harshly criticized his reasoning.[1] Mr. Myers' opinion relied on twisting the meaning of the statutory word "or" to mean its opposite: "and." Mr. Myers' actions and legal advice in the Glamis matter reveal an activist preference for natural resource extraction that disrespects tribal values and raises serious questions about his ability to fairly and impartially decide cases affecting the public lands.

Although Glamis' representatives were granted meetings to urge their points of view on top Interior Department officials – an Inspector General report details numerous contacts with representatives of the mining industry on the subject – Mr. Myers' legal opinion and Secretary Norton's subsequent decision to approve the Glamis mine were issued without any input from the Quechan Indian Nation, which by law is entitled to government-to-government consultation.[2] This is especially disturbing in light of the Interior Department's responsibility as the lead agency in the federal government's trust and treaty relationship with the American Indian tribes.

The National Congress of American Indians (NCAI), which was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments, unanimously approved a resolution opposing Mr. Myers' nomination. This is the first time NCAI has opposed one of President Bush's judicial nominees. NCAI explained that Mr. Myers' actions as Interior Solicitor "show a deep lack of respect and understanding of the unique political relationship between the federal government and tribal governments" and "could result in the extinguishment of the Quechan people's tribal heritage." *See* NCAI Resolution ABQ-03-061 (2003), *available at* http://www.ncai.org/data/docs/resolution/annual2003/03-061.pdf.

Mr. Myers' second formal opinion – and his subsequent correction to it – prevents even the voluntary retirement of federal grazing permits relinquished by ranchers in co-operation with groups like the Grand Canyon Trust, which has invested more than $1.5 million in its effort to retire grazing permits and reduce grazing impacts on publicly owned lands. These voluntary transactions enjoy wide, bipartisan support, but are opposed by the grazing industry. Mr. Myers went to great lengths to support the grazing lobby and undermine the efforts of environmentalists to use the free market to achieve conservation goals. Indeed, Mr. Myers has been so one-sided in his support of his former grazing clients that his actions have been the subject of two additional ethics investigations by the Interior Department's Inspector General. While the first of these investigations closed without finding actionable wrongdoing by Mr. Myers, the report painstakingly documents the continuous intimate contact between Mr. Myers and the industries he once represented, which shows, at the very least, poor judgment on the part of Mr. Myers. The IG is still working on an investigation into a stunningly one-sided and apparently illegal settlement agreement with a rogue grazer named H. Frank Robbins that was negotiated under Mr. Myers' watch.

Especially for organizations concerned about environmental protection and the important natural resources within the Ninth Circuit, Mr. Myers' intemperate criticism of environmental

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[1] Mineral Policy Center v. Norton, 2003 WL 22708450 (D.D.C. Nov. 18, 2003), *available at* http://www.dcd.uscourts.gov/01-73.pdf.

[2] The Department's role, and Mr. Myers' involvement, in the validity determination, finding Glamis Gold's mining claimed to be valid, was the subject of an Inspector General investigation in October 2002 through March 2003.

safeguards and environmentalists provides further reason to question his capacity to serve as an impartial judge in environmental cases. Mr. Myers has compared the federal government's management of the public lands to King George's "tyrannical" rule over the American colonies and claimed that public land safeguards are fueling "a modern-day revolution" in the American West.[3] He has denounced the California Desert Protection Act as "an example of legislative hubris"[4] and claimed that many environmental laws have the "unintended consequence of actually harming the environment."[5] He has called environmental critics of his Department's policies the "environmental conflict industry" and he has stressed the "importance of . . . rejecting [their] scheming."[6]

Beyond the environmental arena, Mr. Myers has advocated an extreme legal philosophy that would also seriously threaten civil rights and other protections. This is illustrated by a Supreme Court "friend-of-court" brief Myers filed in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt* on behalf of the National Cattlemen's Association. His status as both client and counsel in the case precludes an assertion that he does not espouse the views expressed in the brief and was merely representing his client. In *Sweet Home,* Mr. Myers argued that "the Constitutional right of a rancher to put his property to beneficial use is as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure."[7] The Supreme Court has held that a very limited number of "fundamental" rights, including freedom of speech, are entitled to the highest level of protection ("strict scrutiny"). Such rights can be limited only if there is a compelling governmental interest, using means that are "narrowly tailored" to address the government's interest.

Mr. Myers' argument for elevating ranchers' property rights would place these rights above the vast majority of other rights, including many aspects of the right to privacy. Indeed Mr. Myers has praised what he called the Supreme Court's "retreat" from the protection of privacy.[8] His approach apparently would apply strict scrutiny to federal and local laws and regulations that limit the use of property. This revolutionary theory would return the federal courts to their discredited pre-New Deal role in which they stood as the guardians of property to the exclusion of almost all government reform and thus could lead to the invalidation as unconstitutional of a vast range of labor, health, environmental, disability, civil rights, zoning, and other basic laws that Americans have come to take for granted.

Challenges under the Takings Clause ordinarily focus on the impact of a regulation as applied to a particular claimant, but Mr. Myers argued in *Sweet Home* that key Endangered

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[3] William G. Myers III, *Western Ranchers Fed Up with Feds*, FORUM FOR APPLIED RES. & PUB. POL., Winter 1996 at 22.

[4] William G. Myers III, *Environmental Command and Control: The Snake in the Public Lands Grass*, *in* FARMERS, RANCHERS & ENVIRONMENTAL LAW 209 (1995)).

[5] *Id.* at 208.

[6] William Myers, *Agency Lawyer Has Obligation to Speak on Behalf of a Client*, IDAHO STATESMAN, Nov. 26, 2002, *available at* http://www.idahostatesman.com/Search/story.asp?id=26580.

[7] Brief of the National Cattlemen's Association and the CATL Fund, Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. 687 (1995).

[8] William G. Myers III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 DENVER U. L. REV. 1, 24-25 (1988); *see also*, William G. Myers III, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork,* 17 HASTINGS CONST. L.Q. 399 (1989-1990).

Species Act safeguards that apply to private property are facially unconstitutional. In other words, Mr. Myers believes that government lacks the authority to enact these safeguards under any circumstances. Mr. Myers thus proposed a radical extension of the Takings Clause that no court has ever countenanced. If accepted, Mr. Myers views could well require taxpayers to pay corporations simply for having to comply with health, labor, civil rights, and environmental protections.

The constitutional argument advocated by Mr. Myers in his "friend-of-court" brief to the Supreme Court in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* is equally extreme. Mr. Myers argued that Congress does not have the power under the Constitution's Commerce Clause to prevent a waste disposal facility from destroying waters and wetlands that serve as habitat for migratory birds. His brief suggests that "federal regulation of land use" is beyond congressional power because that area is "traditionally regulated by state and local governments."[9] The Commerce Clause is the authority upon which many of our most essential health, safety, environmental, and anti-discrimination laws are based. If protection of waters from pollution caused by a commercial waste disposal operation that threatens the interstate flight of migratory birds does not fall within the scope of the Commerce Clause, then a wide array of protections could also be subject to attack. That is why a large coalition of civil and human rights organizations filed a brief in *SWANCC* arguing that such a narrow interpretation of the Commerce Clause would "cast serious doubt on the previously well-accepted foundations of some of the central civil rights laws of our time."[10] Indeed, although the Court did not specifically rule on the constitutional issue in SWANCC, four justices dismissed the argument that Congress did not have power to regulate the wetlands as having "no merit."[11] This aspect of Mr. Myers' philosophy is extremely troubling, as is his claim that Robert Bork's judicial philosophy was "well within the parameters of acceptable constitutional theory, worthy of representation on the Supreme Court," despite the Senate's bipartisan rejection of Judge Bork's legal philosophy as out of the mainstream.[12]

Mr. Myers' record as Interior Solicitor of favoring the interests of the grazing and mining industries over the rights of Native Americans and the environment, coupled with his long history as an extreme advocate for the those industries, cast serious doubts on his willingness or ability to put aside his personal views in performing his official duties. His disturbing legal philosophy threatens a broad range of civil rights, labor, health, disability, and environmental protections. His poor ABA rating reflects his weak qualifications for a lifetime seat on the Ninth Circuit. In all respects, Mr. Myers appears to be a singularly poor choice for this critical court. We strongly urge you to reject this nomination.

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[9] Brief of the American Farm Bureau Federation, the National Cattlemen's Beef Association, and the North Dakota Farm Bureau, *SWANCC*, 531 U.S. 159 (2001), *available at* 2000 WL 1059641.
[10] Brief of the Anti-Defamation League, et al, *SWANCC*, 531 U.S. 159 (2001), *available at* 2000 WL 1369409.
[11] 531 U.S. at 197 (Stevens, J. with Souter, Ginsburg, and Breyer,, J.J. *dissenting*).
[12] William G. Myers, III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 DENVER L. REV. 1 (1988) at 25.

Sincerely,

Jim Ward, President,
ADA Watch/ National Coalition for Disability Rights

Laird J. Lucas, Executive Director,
Advocates for the West

Nan Aron, President,
Alliance for Justice

Mark Salvo, Grasslands and Deserts Advocate,
American Lands Alliance

Jeff Soule, FAICP Policy Director,
American Planning Association

S. Elizabeth Birnbaum, Director of Government Affairs,
American Rivers

Don Hoffman, Director,
Arizona Wilderness Coalition

Jack Trope, Executive Director,
Association on American Indian Affairs

Susan Heitker, Executive Coordinator,
Buckeye Forest Council

Daniel R. Patterson, Ecologist,
Center for Biological Diversity

Paul Schwartz, National Campaigns Director,
Clean Water Action

Dawn Hamilton, Executive Director,
Coast Alliance

Susan Lerner, Executive Director,
Committee for Judicial Independence

William Snape, Vice President and Chief Counsel,
Defenders of Wildlife

Julia Epstein, Director of Communications,
Disability Rights Education and Defense Fund

Vawter Parker, Executive Director,
Earthjustice

Beth Lowell, Policy Director,
Endangered Species Coalition.

Iryna Kwasny, Senior Staff Attorney,
Environmental Law Foundation

Ken Cook, President,
Environmental Working Group

John Horning, Executive Director,
Forest Guardians

Andy Stahl, Executive Director,
Forest Service Employees for Environmental Ethics

Timothy J Flood, Conservation Coordinator,
Friends of Arizona Rivers

Sarah Zdeb, Legislative Director,
Friends of the Earth

Nathan Baker, Staff Attorney,
Friends of the Columbia Gorge

Susan Czopek, Political Director,
Great Basin Mine Watch

Veronica Egan, Executive Director,
Great Old Broads for Wilderness

Dick Dolan, GYC Program Director,

Greater Yellowstone Coalition

Ric Bailey, Executive Director,
Hells Canyon Preservation Council

John McCarthy, Policy Director,
Idaho Conservation League

Tom FitzGerald, Director,
Kentucky Resources Council, Inc.

Mike Petersen, Executive Director,
The Lands Council

Wade Henderson, Executive Director,
Leadership Conference on Civil Rights

Betsy Loyless, Vice President for Policy,
League of Conservation Voters

Lexi Shultz, Legislative Director,
Mineral Policy Center/ Earthworks

Tex Hall, President,
National Congress of American Indians

Kevin S. Curtis, Vice President,
National Environmental Trust

Andrew George, Campaign Coordinator,
National Forest Protection Alliance

Kim Gandy, President,
National Organization for Women

Ed King, Executive Director,
National Senior Citizens Law Center

David F. Conrad, Executive Director,
National Tribal Environmental Council

David McIntosh, Staff Attorney,
Natural Resources Defense Council

Joshua R. Daniels, Chair,

New Leadership for Democratic Action

Dave Werntz, Science Director,
Northwest Ecosystem Alliance

Nina Bell, Executive Director,
Northwest Environmental Advocates

Rion Ramirez, President,
Northwest Indian Bar Association

Ellen M. Athas, Program Counsel & Director,
The Ocean Conservancy

James R. Cox, President,
Oilfield Waste Policy Institute

Bonnie Phillips, Conservation Chair,
Olympic Forest Coalition

Bill Marlett, Executive Director,
Oregon Natural Desert Association

Jay Ward, Conservation Director,
Oregon Natural Resources Council

Stephanie M. Parent, Acting Director,
Pacific Environmental Advocacy Center

Ralph Neas, President,
People for the American Way

Daniel J. Sokatch, Executive Director,
Progressive Jewish Alliance

Jeff Ruch, Executive Director,
Public Employees for Environmental Responsibility

Mike Jackson, Sr., President,
Quechan Indian Nation

Arlan Melendez, Chairman,
Reno-Sparks Indian Colony

Richard Hill, President,

Save the Valley, Inc.

Carl Pope, President,
Sierra Club

Holly Maguigan and Beto Juarez, Co-Presidents,
Society of American Law Teachers

Heidi McIntosh, Conservation Director,
Southern Utah Wilderness Alliance

Kevin Bixby, Executive Director,
Southwest Environmental Center

John Blair, President,
Valley Watch, Inc.

Jon Marvel, Executive Director,
Western Watersheds Project

Leslie Jones, Deputy General Counsel,
The Wilderness Society

ELKO BAND COUNCIL

1745 Silver Eagle Drive • Elko, Nevada 89801
775-738-8889 • Fax 775-753-5439

February 2, 2004

Senator Patrick Leahy (Ranking Member)
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Patrick Leahy:

Elko Band Council writes to express our opposition to the confirmation of Williams G. Meyers III to the 9th Circuit Court of Appeals. Former Solicitor of Interior Myers' disregard for federal law affecting Native sacred places compels our view that he is unable to fairly and impartially apply the law and thus should not be confirmed.

As Solicitor of the Department of the Interior, William G. Meyers was the architect of a rollback of protections for sacred native sites on public lands that are central to the religion of many Native American people. In one of only three formal opinions issued by Myers in his two-year tenure at Interior, Myers reached the clearly erroneous conclusion that the Bureau of Land Management (BLM) does not have authority under the Federal Land Policy and Management Act (FLPMA) to prevent undue degradation of public lands and protect sites of religious significance to Native Americans.

Myers's opinion – which overturned a well-reasoned legal opinion by his predecessor – wrote the term "undue" out of the statutory text, concluding that any practice necessary for a mining operation was by definition not "undue." It is hard to imagine a more fundamental misreading of the language and intent of FLMPA. No wonder the American Bar Association has raised serious questions about Myers's legal qualifications for a position on the federal appellate bench. Equally troubling to Native Americans is the shameful exclusion of the Quechan Indian Nation and other tribes from the decision to reconsider the Glamis mine project.

The Ninth Circuit encompasses nine western states and other territories, including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii. It also contains scores of reservations, more than one hundred Indian tribes, millions of Indian people, and millions of acres of public lands. The Ninth Circuit is often the critical forum for deciding important

important federal and tribal land management issues. Myers' actions and legal advice in the Glamis matter reveal an activist preference for natural resource extraction that disrespects tribal values and raises serious questions about his ability to fairly and impartially decide cases affecting the public lands.

For these reasons, we formally oppose Myers' nomination to the Ninth Circuit. We do not take this step lightly – but when a nominee has acted with such blatant disregard for federal law and Native American sacred places, we must speak out.

Sincerely,

Hugh Stevens

Hugh Stevens, Vice-Chairman
Elko Band Council

Statement of
The Honorable Orrin Hatch.
United States Senator
Utah

February 5, 2004

PRINTABLE VERSION

February 5, 2004

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary Hearing On The Nomination of

WILLIAM MYERS FOR THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

It is my pleasure to welcome before the Committee this morning three exceptional nominees for the federal bench.

Our circuit nominee today is Bill Myers, who has been nominated to fill a vacancy on the Ninth Circuit, the most notoriously liberal federal court in the United States. This is the court that gave us the infamous Pledge of Allegiance case, which held that the Pledge of Allegiance is unconstitutional because it contains the word "God." As a result, public schoolchildren in the nine western states and two territories that constitute the Ninth Circuit are forbidden from pledging allegiance to the flag of the United States, even as their mothers and fathers, uncles and aunts, other relatives and friends are fighting in Iraq, Afghanistan, and all over the world against terrorists to preserve our national security and the ideals that we most treasure in our nation.

Unfortunately, the Pledge of Allegiance case is not an anomaly. For example, the Ninth Circuit has reversed death sentences at an increasingly high rate, which moves it out of step with all other circuit courts. While all other circuit courts uphold approximately 80% of death penalty convictions, the Ninth Circuit has gone the other way, reversing a majority of convictions in most years and approximately 80% of convictions over the last three years. Most recently, in the September 2003 Summerlin decision, an 11 judge, en banc Ninth Circuit panel ruled 8 to 3 that the U.S. Supreme Court's 2002 decision in Ring v Arizona—which held that capital defendants have a constitutional right to a jury determination of the facts supporting their death sentences—applies retroactively to over 100 death row inmates who were sentenced by judges. Of the 11 panel judges, ONE was appointed by a Republican President. The majority opinion not only ignored Supreme Court precedent regarding the Arizona Supreme Court's construction of its own state law, and not only—in the words of the dissenters—"wander[ed] far afield" of Ring v Arizona and the precedents on which that

decision was based, but reversed the death sentence of a rapist and murderer in the process. The dissenters persuasively explained: "The majority opinion's analysis is not compatible with Supreme Court precedent, our prior rulings, or the law of our sister circuits." Result-oriented and ideology-driven decisions like Summerlin are perfect examples of why the Ninth Circuit desperately needs good, constitutionalist judges.

The Ninth Circuit has also held in recent years that California's so-called three strikes law, which imposes life sentences on career criminals, was unconstitutional. It held that a prisoner who was convicted of making terrorist threats had a right to procreate through artificial insemination. This case, which became known as the procreation by FedEx case, was later reversed by an en banc panel of the Ninth Circuit, but just barely. Yet another gem from the Ninth Circuit held that prisoners have a constitutional right to pornography, which had been banned because inmates had used it to harass women guards. Fortunately, saner heads prevailed, and this case was reversed en banc.

Plenty of Ninth Circuit decisions, however, are not corrected en banc, which has led to the Ninth Circuit holding the dubious distinction of having the highest and widest Supreme Court reversal rate in the country among the federal courts of appeals. Over the past seven years, the Supreme Court has reversed an average of 80 to 90% of the Ninth Circuit cases it hears. In the 2002 term, the Supreme Court reversed the Ninth Circuit in 15 of 19 cases, 8 times unanimously. In 2003, the Supreme Court reversed three Ninth Circuit decisions by unanimous summary reversal, which means that the Court simply reversed on the basis of the petition for certiorari, without asking for briefs or oral arguments. I fear, however, that the Ninth Circuit is beyond embarrassment.

I find it interesting that of the 26 active judges on the Ninth Circuit, 17 of them were appointed by Democratic presidents, and 14 of them were appointed by President Clinton alone. In fact, 4 Clinton nominees to the Ninth Circuit were confirmed in 2000, a presidential election year. Despite this record, only one of President Bush's three nominees to the Ninth Circuit was confirmed in the 107th Congress. I'm proud that this Committee's record has been better so far in the 108th Congress, with three of four Ninth Circuit nominees confirmed. But the continuing filibuster of the fourth nominee, Carolyn Kuhl, based on gross distortions of her record and a rigid pro-abortion litmus test, is a national disgrace. So much for achieving any so-called balance.

Let me also note what Senator Schumer said about Bush nominee and current Ninth Circuit judge Jay Bybee before voting to confirm him to that court last year: "Jay Bybee, make no mistake about it, is a very conservative nominee. It is fair to put him in a similar category with many of the more conservative nominees we have had. If Mr. Bybee were nominated to another court that is hanging in the balance or where most of the nominees were conservative, I probably wouldn't vote for him. If he were nominated for the Supreme Court, for example, there would be a different calculus. But Mr. Bybee is nominated to the Ninth Circuit. The Ninth Circuit is by far the most liberal court in the country. Most of the nominees are Democratic from Democratic Presidents. It is the court that gave us the Pledge of Allegiance case which is way out of the mainstream

on the left side. Therefore, I think Jay Bybee will provide some balance." Similarly, confirming mainstream nominees like Bill Myers will be another step towards restoring some measure of balance to the Ninth Circuit.

As you will hear in greater detail from Senators Craig and Crapo, and Idaho's Congressmen, Bill Myers has an exemplary record that includes service as a successful, committed advocate and public servant. As Solicitor for the Department of the Interior—a position to which he was confirmed in 2001 without opposition—Mr. Myers supervised over 300 attorneys and 100 support staff in 19 separate offices throughout the United States, and managed a $47 million annual budget. He has served as counsel here in the Senate, to our former colleague Senator Al Simpson, and in both the Department of Justice and Department of Energy. His confirmation is supported by Democrats—including former Wyoming governor Mike Sullivan and former Idaho governor Cecil Andrus, who also served President Carter as Secretary of the Interior—and Republicans alike.

Unfortunately, no judicial nominee these days seems to escape criticism by the left-wing special interest groups. Bill Myers is no exception. I expect that we will hear attacks on his record as the Interior Department's Solicitor, where he was doing his duty to represent the policy positions of the United States. We will probably hear attacks on his record in private practice stemming from the types of clients he represented and the positions he took on their behalf—as if ranchers and those who make economic uses of Western lands are less entitled to representation than the big city, liberal environmental groups that attempt to dictate Western land policy while referring to most of our nation as "flyover country." And I expect that some will try to import debates on various environmental and public lands policy issues into this nominations hearing, in an attempt to smear both Bill Myers and the Bush Administration.

Let me emphasize again, for those who still don't get it: the Constitution did not and does not establish federal courts as the policymaking branch of the government. Federal judges don't make policy. And policy debates ought to have no place in our consideration of a nominee's qualifications to serve as a federal judge—unless we think that he or she doesn't understand the proper role of federal judges under our Constitutional system. Absent absurd distortions of his record, there is zero evidence that Bill Myers doesn't understand that proper role.

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Hopland Band of Pomo Indians
PO Box 610, Hopland, California 95449 Phone (707) 744-1647 ext. 1110 Fax (707) 744-1506

February 3, 2004

The Honorable Patrick J. Leahy
Ranking Member
152 Senate Dirksen Office Building
Washington, DC 20510

Re: OPPOSITION to Nomination of William G. Meyers III to the 9th Circuit Court of Appeals

Dear Senator Patrick J. Leahy:

On behalf of the Hopland Band of Pomo Indians, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people and other Colorado River tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review or citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed-door meetings in which Glamis Gold, the applicant, and the National Mining Association, its trade group, were granted extensive and exclusive access to the decision makers and their counsel prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

Mr. Myers' nomination is of great concern for several reasons:

1. Mr. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal governments grounded in the United States Constitution, federal statutes, adopted policy statements and trust responsibility.

2. As DOI Solicitor, it was his duty to advise DOI to consult with the tribe. The ability to understand these complex issues is particularly important for a lifetime judicial seat that encompasses nine western states and territories including California, scores of Indian reservations and lands, well over a hundred Indian tribes, millions of Indian people and important federal and tribal lands management issues.

3. Mr. Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan peoples's tribal heritage and sacred places.

Sandra C. Sigala, Tribal Chair; Alice Becerra, Vice Chair; Julie Vedolla Fuentes, Secretary; James "Red" Crandell, Treasurer; Orval Elliott, Sr., Council Member; William Elliott, Council Member; Hale Knight, Jr., Council Member

4. As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contacts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

For these reasons, the Hopland Band of Pomo Indians respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California Indian tribes be invited to provide testimony on this important matter.

Sincerely,

Sandra C. Sigala
Tribal Chairperson

Cc: California Nations Indian Gaming Association
Quechan Indian Nation

19 TRIBES

INTER TRIBAL COUNCIL of ARIZONA

MEMBER TRIBES
AK-CHIN INDIAN COMMUNITY
COCOPAH TRIBE
COLORADO RIVER INDIAN TRIBES
FORT McDOWELL YAVAPAI TRIBE
FORT MOJAVE TRIBE
GILA RIVER INDIAN COMMUNITY
HAVASUPAI TRIBE
HOPI TRIBE
HUALAPAI TRIBE
KAIBAB-PAIUTE TRIBE
PASCUA YAQUI TRIBE
QUECHAN TRIBE
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY
SAN CARLOS APACHE TRIBE
TOHONO O'ODHAM NATION
TONTO APACHE TRIBE
WHITE MOUNTAIN APACHE TRIBE
YAVAPAI APACHE NATION
YAVAPAI PRESCOTT INDIAN TRIBE

January 29, 2004

The Honorable Patrick J. Leahy
152 Senate Dirksen Office Building
Washington, DC 20510

Re: OPPOSITION to Nomination of William G. Myers III to the 9th Circuit Court of Appeals

Dear Senator. Leahy,

As President of the Inter Tribal Council of Arizona, comprised of 19 member tribes, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people and other Colorado River tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review or citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed-door meetings in which Glamis Gold, the applicant, and the National Mining Association, its trade group, was granted extensive and exclusive access to the decision makers and their counsel prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

2214 North Central Ave. • Suite 100 • Phoenix, Arizona 85004 • (602) 258-4822 • Fax (602) 258-4825

Mr. Myers' nomination is of great concern for several reasons:

1. Mr. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal governments grounded in the United States Constitution, federal statutes, adopted policy statements and trust responsibility.

2. As DOI Solicitor, it was his duty to advise DOI to consult with the tribe. The ability to understand these complex issues is particularly important for a lifetime judicial seat that encompasses nine western states and territories including California, scores of Indian reservations and lands, well over a hundred Indian tribes, millions of Indian people and important federal and tribal lands management issues.

3. Mr. Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage and sacred places.

4. As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contacts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

As President of the Inter Tribal Council of Arizona and on its behalf, I respectfully request that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes and tribal governments in Arizona be notified prior to the date of confirmation hearings. We also ask that representatives of the Quechan tribe be invited to provide testimony on this important matter.

Sincerely,

Nora McDowell, President
Inter Tribal Council of Arizona
Chairwoman, Fort Mojave Tribe

Cc: California Nations Indian Gaming Association
Quechan Indian Nation

JUSTICE FOR ALL PROJECT

Via Fax (202) 228-2258

January 30, 2004

The Honorable Dianne Feinstein
The United States Senate
Washington, DC 20510

Dear Senator Feinstein:

We are writing, as members of the Justice For All Project, to express our grave concern over the nomination of William G. Myers III to the United States Court of Appeals for the Ninth Circuit. Myers' record is replete with statements and actions which show a deep-seated hostility to environmental protections, as well as disdain for the public's interest and minority rights. Myers' statements and positions also raise significant questions regarding his commitment to privacy rights and to a woman's right to choose. We urge you to personally attend the up-coming Senate Judiciary Committee hearing on this nominee in order to fully explore the many troubling aspects of his record.

The Justice For All Project is a statewide coalition of organizations which support a fair and balanced judicial nominating process and oppose an extreme right-wing federal bench engaged in ultra-conservative judicial activism. The Justice For All Project supports the appointment of federal judges who are open-minded, who view the Constitution as a living document, and are committed to the role of the federal courts in protecting civil rights, individual liberties and the environment, and in guaranteeing due process, equal protection of the laws, the right of privacy and access to justice.

Myers' record raises grave doubts that he satisfies these standards and would put aside his outspokenly expressed personal extremist ideology if confirmed to the Ninth Circuit bench. He most recently served as Solicitor General of the Interior Department, where he was instrumental in rolling back several important Clinton-era environmental protections, using the result-oriented legal reasoning and deliberate misconstruction of statutory terms that we have come to expect from the far right. For a number of years, Myers represented and lobbied for the National Cattleman's Beef Association, which supports privately owned livestock grazing (for minimal fees if any) on public lands.
The *Idaho Statesman* has described him as having "a reputation for being pro-ranching, pro-grazing and being shaky on the environment," and, in an editorial, concluded that as Interior Solicitor, "Myers sounds less like an attorney, and more like an apologist for his old friends in the cattle industry." [1]

[1] "A Rancher's Advocate, or the People's Attorney?" 11/22/02

Our concern centers around three areas:

- Undue Deference for Property Rights: We believe that Myers should be questioned regarding positions he has taken that indicate a belief that property rights must be granted deference on the same basis as individual rights such as freedom of speech.[2] His position that property rights are as "fundamental" as constitutionally protected individual rights such as freedom of speech and freedom from unreasonable search and seizure are all too similar to the extreme views held by another Bush nominee, Janice Rogers Brown. Various statements, such as his comparison of the government's management of public lands to King George's "tyrannical" rule over the American colonies and claim that public land safeguards are fueling "a modern-day revolution" in the American West,[3] raise questions as to whether he adheres to an extremist ideology outside of the mainstream.

- Disdain for the Public Interest and Minority Rights: As Californians, we are grateful for your sponsorship of the California Desert Protection Act, a laudable 1994 federal statute that designated two national parks (Death Valley and Joshua Tree) and one national preserve (the Mojave) and which you have successfully used to protect additional "environmentally sensitive private properties" in order to preserve what you have termed the "scenic, recreational, cultural and scientific value of the California desert." Nevertheless, actions taken by Myers while Interior Department Solicitor General threaten the destruction of thousands of acres of land in the California desert in order to benefit the private interests of a mining company by allowing a permit for a massive cyanide heap leach gold mine to issue. The objective basis of these actions is called into question by Myers' assertion that the California Desert Protection Act is "an example of legislative hubris,"[4] as well as Myers' record of hostility to environmental protections.[5] We are equally alarmed by Myers' active role in seeking to override the local denial of a special use permit to operate two open clay pit cyanide leach mines on federal land north of Reno, Nevada. The clay would be processed into "kitty litter" in a proposed plant on private land adjoining the federal property.

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[2] Amici Brief, Babbitt v. Sweet Home, 1994 U.S. Briefs 859.
[3] *Western Ranchers Fed Up with Feds*, FORUM FOR APPLIED RES. & PUB. POL., Winter 1996 at 22.
[4] Farmers, Ranchers & Environmental Law 209 (1995)
[5] Myers described the ruling in *Appalachian Power Co. v. EPA*, which struck down EPA's reliance on a guidance document it had issued, as "a major victory for any industry, including ranching, that suffers from over-regulation by the federal government." *Raining on the Regulators' Parade*, The Idaho Wool Grower Bulletin, June 2000. He has referred to the Endangered Species Act and the Clean Water Act's wetlands protections as examples of "regulatory excesses" that have the "unintended consequence of actually harming the environment." *Environmental Command and Control* at 208, and asserts that it is "the fallacious belief that centralized government can promote environmentalism." *In* Frmrs., Rnchrs. & Envtl. Law 206 (1995.)

These actions demonstrate Myers' willingness to allow his personal ideology to override clear public policy favoring the public's interest in protecting our scenic heritage, as well as public health and safety. In both instances, Myers' actions have dire ramifications for Native American tribes, whose lands will be significantly impacted by the planned open pit mining operations. In California, the massive gold mine would destroy lands sacred to the Quechan Nation and other Colorado River tribes. Yet Myers refused to even meet or consult with tribal representatives. We commend to you the January 28, 2004 letters of the National Congress of American Indians and the Quechan Indian Tribe opposing Myers' nomination for their detailed discussion of the shaky legal and moral basis for Myers' actions. The kitty litter mine and plant is vigorously opposed by the Reno-Sparks Indian Colony. We urge you to question Myers closely on the basis for his failure to fulfill his obligations to the public and the Interior Department's trust obligations to Native American tribes.

- Narrow View of Privacy Rights: Myers' publicly expressed opinions regarding privacy and the right to choose are more limited than his record on environmental and land use issues, yet nevertheless raise significant concerns. Myers' assertion that Judge Robert Bork should have been confirmed for a seat on the U.S. Supreme Court because his "judicial philosophy was well within the parameters of acceptable constitutional theory,"[6] is surprising, given Judge Bork's well-known position that there is no constitutional right to privacy, a far from mainstream position. Myers has expressed a troublingly narrow view of unenumerated rights and, most particularly, the right to privacy. Myers has argued that the Supreme Court's decisions in *Griswold v. Connecticut* (holding that married people have a right to contraception) and *Roe v. Wade* (establishing a privacy right to safe legal abortion) are based on the "personal moral values of the justices." He contrasts this to the ruling in *Bowers v. Hardwick* (finding anti-sodomy laws constitutional) which he asserts is based on "a neutral reading of the Constitution."[7] Both the *Griswold* and *Roe* decisions remain good law; *Bowers* was overruled last term in *Lawrence v. Texas*. We urge you to fully explore Myers' current understanding of the right to privacy and his ability to safeguard that essential right if confirmed to the Ninth Circuit.

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[6] William G. Myers III, *Advice and Consent on Trial: The Case of Robert H. Bork*, 66 Denver U. L. Rev. 1, 24-25 (1988); see also, William G. Myers III, *The Role of Special Interest Groups in the Supreme Court Nomination of Robert Bork*, 17 Hastings Const. L.Q. 399 (1989-1990).

[7] *Id.*

We believe that Myers' record and statements raise considerable concerns which require extensive exploration. We urge you to carefully question him at his up-coming Judiciary Committee hearing.

Sincerely,

Susan Lerner for

Justice For All Project

Members of the Justice for All Project include:

Vicki Bermudez, RN
Regulatory Policy Specialist
California Nurses Association
Sacramento, CA

Candance M. Carroll, Esq.
President
California Women Lawyers
San Diego, CA

Susan Lerner, Chair
Committee for Judicial Independence
Los Angeles, CA

Elizabeth Sholes
Public Policy Coordinator
California Church IMPACT
Sacramento, CA

Lyn Hilfenhaus, Chair
Women's Caucus, California Democratic Party
Los Angeles, CA

Mark Hull-Richter
California Groups Moderator
Democrats.com
Orange County, CA

Patrisha A. Wright
Director of Government Affairs
Disability Rights Education and Defense Fund
Berkeley, CA and Washington, DC

Sharon Gadberry, PH.D. President
NAWBO-San Francisco Chapter
San Francisco, CA

Ellie Craig Goldstein, President
National Council of Jewish Women/Los Angeles
Los Angeles, CA

Helen Grieco, Executive Director
California National Organization for Women
Sacramento, CA

Marcos Barron, Director
People for the American Way, Western Region
Los Angeles, CA

Martha Swiller, Acting President and CEO
Planned Parenthood Los Angeles
Los Angeles, CA

Anne Patton, Chair
Republicans For Choice
San Diego, CA

Pam Cooke
Stonewall Democratic Club
Los Angeles, CA

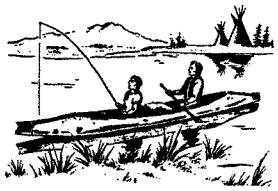
Bill Lakin, Board Member
Unitarian Universalist Project Freedom of Religion
Cambria, CA

Eric Gordon, Director
The Workmen's Circle/Arbeter Ring SoCal District
Los Angeles, CA

John Affeldt, Managing Attorney
Public Advocates, Inc.
San Francisco, CA

Joyce Schorr, President
Womens Reproductive Rights Assistance Project
Los Angeles, CA

cc: Senator Orrin Hatch
Senator Patrick Leahy



KALISPEL TRIBE OF INDIANS

January 27, 2004

Mr. Patrick Leahy
United States Senator
199 Main Street 4th Floor
Burlington, VT 05401

RE: Ninth Circuit Court of Appeals Nominee William G. Myers, III

Dear Senator Leahy:

On behalf of the Kalispel Tribe of Indians, representing more than 360 Native Americans within the interior and exterior boundaries of the Kalispel Indian Reservation located within the Ninth Circuit, we would like to voice our opposition to the nomination of William G. Myers, III to the Ninth Circuit Court of Appeals.

William G. Myers, III has been nominated to a seat on the Ninth Circuit Court of Appeals, which hears federal appeals in nine (9) Western States. Mr. Myers is a lawyer for the Department of Interior, which oversees the Bureau of Indian Affairs and the management of federal lands. Based on Mr. Myers' prior legal representations it is inordinately clear that he would use his position on this key appeals court to promote his personal agenda, which favors the interest of private industry over the rights of Native American Tribes and individuals. Court documents demonstrate that he has undermined important legal precedent that protected sacred sites on public lands from undue degradation.

As a tenure employee for the Department of Interior, Bureau of Indian Affairs, Mr. Myers purports to work for the benefit of, and in the best interest of, Native Americans and management of federal lands. However, as evidenced in prior court cases, Mr. Myers actively participated in cases opposing both tribal claims and major tribal issues. For example, Mr. Myers argued on behalf of the Department that the United States was not liable to the Navajo Nation for up to $600 Million Dollars in damages for breach of fiduciary duty in connection with the Secretary's approval of the mineral lease;

BOX 39 • USK, WA 99180 • PHONE (509) 445-1147 • FAX (509) 445-1705

Mr. Myers repudiated his predecessor's formal legal opinion in order to clear the way for approval of the previously rejected cyanide heap-leach Glamis gold mine that would destroy sacred Quechan tribal lands and pollute the environment; Mr. Myers argued on behalf of the Bureau of Land Management that neither the Reno-Sparks Indian Colony nor local officials had the authority to prevent a "kitty litter" mine from permanently endangering the quality of life of the Colony and other residents of the vicinity; Mr. Myers delayed conducting a resurvey that Sandia Pueblo Tribe requested, which would have helped to resolve a boundary dispute involving roughly 10,000 acres of land claimed by the Pueblo. The resurvey was needed after a court invalidated an old survey drawing the boundaries of the Pueblo in the wrong place. Mr. Myers' position was to wait to see first what Congress will do; Mr. Myers committed a fraud on the Court by failing to disclose the true status of the TAAMS Project between September 1999 and December 21, 1999; Mr. Myers committed a fraud on the Court by filing false and misleading quarterly status reports starting in March 2000, regarding TAAMS and BIA data cleanup. The Court pointed out the egregious nature of Mr. Myers and the Department's conduct; Mr. Myers argued on behalf of the Department that the Court of Federal Claims had no jurisdiction to hear the White Mountain Apache Tribe's claim that the United States failed to properly maintain lands held in trust for the benefit of the Tribe; and Mr. Myers argued on behalf of the Department that the Paiute-Shoshone Indians of the Bishop Community Tribe could not sue under Section 1983 of the Civil Rights Act where the county had entered upon property belonging to the Tribe to seize employment records.

The United States has an established fiduciary relationship with Native American Tribes. Statutes and regulations assist in defining the contours of the fiduciary responsibilities and duties between the United States and Native American Tribes. It is our opinion Mr. Myers does not support this fiduciary relationship, and if nominated will cause irreparable harm to Native American Tribes. We urge you to oppose the nomination of William G. Myers, III to the Ninth Circuit Court of Appeals.

If you have any questions or would care to discuss this matter further, please contact me.

Sincerely,
KALISPEL TRIBE OF INDIANS

Glen Nenema
Chairman

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006
Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

WADE J. HENDERSON
Executive Director

FOUNDERS
Arnold Aronson*
A. Philip Randolph*
Roy Wilkins*

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Patricia Wright
Disability Rights Education and Defense Fund, Inc.
Raul Yzaguirre
National Council of La Raza

COMPLIANCE ENFORCEMENT COMMITTEE
Karen K. Narasaki
National Asian Pacific American Legal Consortium

(*Deceased)

February 3, 2004

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Hatch and Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to the confirmation of William G. Myers to the U.S. Court of Appeals for the Ninth Circuit.

We are very troubled by many aspects of Myers' record including his disregard and disrespect for the concerns of the Native American community and his troubling legal philosophy that would elevate property rights to a level of constitutional scrutiny reserved for fundamental rights, such as the right to free speech and equal protection. We are also concerned with his limited view of Congress' commerce power, and the implications that flow from that view as it impacts civil rights.

In his role as solicitor for the Department of the Interior, and as an advocate and lobbyist for the interests of public land industries, miners, cattlemen, and ranchers, Myers has shown an alarming insensitivity to the heritage and traditions of Native Americans. Myers' pro-industry bias, at the expense of the interest of Native Americans, has led the National Congress of American Indians, the nation's oldest and largest organization of Native American and Alaskan tribal governments, to adopt a formal resolution in opposition to Myers' nomination to the Ninth Circuit. NCAI's 2003 resolution cited Myers' "deep lack of respect and understanding of the unique political relationship between the federal government and tribal governments" as well as his "demonstrated [] inability to set aside personal bias to act in a neutral and objective manner." Myers' nomination is of particular concern, given that the Ninth Circuit is home to over one hundred Indian tribes, millions of Indian people, millions of acres of public land, and has jurisdiction over important federal and tribal lands management issues.

Though most of Myers' legal work has focused on environmental issues, some of his writings raise serious concerns about his legal philosophy more generally. For example in the *amicus* brief he authored in the case of *Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers*, 531 U.S. 159 (2001), Myers advocated a very limited view of Congressional power under the Commerce Clause – a view with implications far beyond the environmental policy field. Diminishing congressional authority under the Commerce Clause is a primary goal of the so-called "states' rights" movement that seeks to limit the power of Congress to enact legislation that protects our civil and constitutional rights. Myers' argument in *SWANCC* could be used to strike down a broad range of federal laws protecting the health, safety, and civil rights of all Americans.

In addition to his views on the limited power of the Commerce Clause to support Congressional authority, Myers has also argued for elevated protection for private property "rights" as a method to invalidate environmental and other governmental regulation. In *Babbitt v. Sweet Home Chapter of Communities of Oregon*, 515 U.S. 687 (1995), Myers filed an *amicus* brief that argued, among other things, that a regulation promulgated under the Endangered Species Act was unconstitutional because it violated cattle ranchers' property rights. In support of this argument, Myers claimed that property "rights" of a rancher were constitutional rights that are "as fundamental as his right to freedom of speech or freedom from unreasonable search and seizure." This elevation of property rights to the level of "fundamental" rights could be used to invalidate a wide range of important health, safety, and environmental regulations. LCCR is especially troubled by the implications of Myers' positions on property rights and the Commerce Clause would have for civil rights cases.

In light of Myers' record of hostility to the interest of Native Americans, his limited view of Congress's Commerce Clause power, with its implications for civil rights cases, and his views of property rights as "fundamental" within our constitutional system, we urge the Judiciary Committee to reject his confirmation to the U.S. Court of Appeals for the Ninth Circuit. If you have any questions or need further information, please contact Nancy Zirkin, LCCR Deputy Director/Director of Public Policy, at (202) 263-2880, or Julie Fernandes, LCCR Senior Policy Analyst, at (202) 263-2856.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director

cc: Senate Judiciary Committee

Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

February 5, 2004

PRINTABLE VERSION

Senator Patrick Leahy
Opening Statement
Nomination of William Myers to the Ninth Circuit Court of Appeals
February 5, 2004

After the attacks of September 11 and the anthrax letters in October 2001, this Committee continued to work. I recall the nomination and oversight hearings we held. One of our Mississippi nominees had to drive to his hearing because in the aftermath of the terrorist attacks, air traffic had not been restored. When the Senate office buildings were closed by the anthrax letters sent to Senator Daschle and to me, we met in the Capitol itself. This week the Senate is, again, taking security precautions by closing Senate buildings and this Committee is, nonetheless, endeavoring to proceed. I commend the Members of the Committee for their cooperation.

We are here today to consider the nomination of William Myers to the Ninth Circuit Court of Appeals. I look forward to hearing his testimony today. As we consider this nominee's qualifications and record, I hope everyone recognizes what is at stake for the country and why the Senate's advice and consent role is so critical.

It is important to recognize that the Senate has already confirmed 171 of President Bush's judicial nominees. One hundred were confirmed in the 17 months of a Democratic Senate majority and the other 71 during the other 20 months. The Senate Judiciary Committee has considered this President's judicial nominees in record numbers and in sharp contrast to the way President Clinton's nominees were delayed and defeated through inaction and anonymous holds. Every judge on the federal bench will have an enormous impact on the lives of individuals, on communities and possibly on the Nation. That is why it is so important that each nominee's record be considered fully and carefully before they are given a lifetime appointment on the federal bench.

William Myers has been nominated to a circuit court with an expansive reach. The Ninth Circuit encompasses Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. In addition to the tens of millions of people within those States, the jurisdiction of that circuit extends over an area of the country which contains hundreds of millions of acres of public lands. This court plays an enormous role in interpreting and applying a broad range of

environmental rules and protections. Those environmental protections are important to me and to millions of Americans, as well as to future generations. They have come under increasing attack during the Bush Administration. We will want to know how Mr. Myers' nomination fits into the pattern of actions by this President to roll back and erode our environmental laws.

What is at stake today is the longstanding acceptance of the Constitution's Commerce Clause as the source of Congress' authority to enact safeguards to protect our air, water, and land. What are at stake are environmental protections which can be struck down if taxpayers do not pay polluters according to the extreme expansion of the takings clause that some judges have begun to adopt. We will want to know what Mr. Myers' understanding of the takings clause is and whether he intends to force taxpayers to pay whenever a regulation affects land use in some way. What standards will he use to decide these matters?

What is at stake is the true meaning of the Constitution's Eleventh Amendment. We will want to know whether he endorses an interpretation of the Constitution that prevents citizens from suing their own States for environmental violations. And, what is at stake is the right of citizens to sue to enforce environmental protections. In an era of ballooning government deficits and cuts in environmental enforcement budgets, there is much at stake if courts eliminate or minimize the critical role of "private attorneys general" who are needed to ensure that polluters are complying with federal mandates.

A judge has a duty to enforce the protections imposed by environmental laws and the Senate has a duty to make sure that we do not put judges on the bench whose activism and personal ideology will prevent fair and impartial adjudication and the protection of the environment that we intended and that the American people and generations to come deserve.

This President has sent the Senate an unusually large number of judicial nominees who seem to be ends-oriented in their approach to the law. After we examined the nominations, some appeared too extreme and to have been nominated for the purpose of packing the courts to achieve ideological ends in their reading, interpretation and application of our laws. We are now seeing nominees who are being awarded lifetime appointments to the federal courts as part of a spoils system for those who are well connected and have served the political aims of this particular Administration. So many of President Clinton's judicial nominees upon whom this Committee took no action seemed to have been penalized for their government service or for having supported the President. Elena Kagan, James Lyons, Kent Markus and so many others never received hearings and their nominations were defeated through Republican inaction, without explanation.

I am sad to report that many of our concerns about President Bush's nominees have already been borne out in the short time those judges have been on the bench. They have shown themselves to be judicial activists and ends-oriented, as some of us had feared. A number of appellate judges appointed by this Administration have issued troubling opinions on civil rights, constitutional liberties, and environmental protections. For example, a Bush-appointed Judge

dissented from the Ninth Circuit's decision to enjoin logging while a lawsuit by environmental groups challenging the implementation of a U.S. Forest Service restoration project involving timber sales in the Sierra Nevada Mountains was pending. Had one other judge on the panel joined the dissent by the Bush-appointed judge, the Ninth Circuit would have made it impossible for plaintiffs in lawsuits to preserve the status quo and prevent irreparable harm while their claims are being decided. Another example is a district court appointee of this President to the District of Utah who, in only his first year on the bench, issued three major opinions denying NEPA claims on public lands and national forest issues.

A review of Mr. Myers' record -- in private practice and in the Bush Administration -- raises some initial concerns that he will be an anti-environmental activist on the bench. We need to explore with him his actions and duties at the Interior Department. As we fulfill our duty as members of this Committee to maintain an independent judiciary, I have questions about what appears to be Mr. Myers' consistent record of using whatever position he has had to fight for corporate interests at the expense of the environment and environmental protections. Mr. Myers' hometown newspaper opined that as solicitor at the Department of Interior: "Myers sounds less like an attorney, and more like an apologist for his old friends in the cattle industry." These are matters we need to explore.

Concerns about Mr. Myers' record have also been expressed in letters of opposition by more than 90 groups who are advocates for civil rights, disability rights, senior citizens, women's rights, human rights, Native Americans, and the environment. And, taking an unprecedented step of issuing a resolution opposing a judicial nominee, the National Congress of American Indians, which represents more than 250 tribal governments, has come out in opposition to this nominee. I will submit the resolution and the letter for the record as well as other statements in opposition when we are allowed to return to our offices, receive mail, and have access to them.

Mr. Myers' lack of court experience is also a concern. He has never tried a jury case nor served as counsel in any criminal litigation as far as I know. The American Bar Association gave him its lowest passing grade. This is also a factor the Senate will want to consider and that we need to explore.

I do not mean to indicate that Mr. Myers does not have friends and supporters. A number of his clients and political friends and fellow lawyers say nice things about him. We look forward to the opportunity to hear from Mr. Myers and to give him the opportunity to respond to concerns that have been raised.

We are operating under unusual circumstances at this hearing. I do not believe we ever held a Senate confirmation hearing in the House Judiciary hearing room before. We, of course, thank Chairman Sensenbrenner, Mr. Conyers and all the Members of the House Judiciary Committee for their hospitality. More important is the fact that we have not been able to prepare for this hearing as we would have liked. For the last several days, we have not had access to our files and computers. Senators have had to abandon their offices and staff has had no place

to work. Some Senators, who had planned to attend the hearing as initially noticed and in the regular course of proceeding, have not been able to participate at this different time and place. For our part, we will continue to operate in good faith and see how much progress can be achieved under these unusual conditions today.
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Published Opposition to the Nomination of William Myers
Nominee to the 9th Circuit Court of Appeals

An Enemy of the Environment, The New York Times, February 13, 2004

The Bush administration has a troubling record of putting lobbyists in influential positions in the executive branch. Now it is taking the practice a step further by nominating a longtime lawyer and lobbyist for the mining and cattle industries, William Myers III, to an important judgeship. His extreme views on the environment, his hard-edged ideological approach to the law and his close ties to industries whose cases he would be deciding make Mr. Myers unqualified to be an appeals court judge.

Until recently, Mr. Myers was the chief legal officer in the Interior Department. Before that, he was a mining industry lawyer and lobbyist and, earlier still, the director of federal lands for the National Cattlemen's Beef Association. A partisan advocate for the interests of the industries he represented, as well as a harsh critic of environmental protections, Mr. Myers regularly took positions that, though legally insupportable, would have had a devastating impact on the environment. He argued in one Supreme Court case that Congress does not have the power under the Constitution to protect wetlands. He also demonstrated a lack of judicial temperament, at one point comparing federal land management to "the tyrannical actions of King George in levying taxes" on the American colonies.

Mr. Myers's defenders argue that it is wrong to confuse his advocacy with how he would act as a judge. But since he has spent so much of his career working for industry, there is little else to evaluate him on. At Interior, he had an obligation to represent the public more broadly, but continued to carry water for special interests. His hometown newspaper, The Idaho Statesman, editorialized that although he had stated in applying for the job that he had "no particular ax to grind," he had ended up acting "less like an attorney, and more like an apologist for his old friends in the cattle industry."

Mr. Myers has been nominated to the United States Court of Appeals for the Ninth Circuit, based in San Francisco, which plays a critical role in overseeing the Western states, where environmental disputes have been most heated. The Senate should insist that the president nominate someone with a proven record of defending broader public interests, rather than those of a powerful few.

Eject Bush: Two More Reasons Bush Has To Go, The Hartford Advocate, October 16, 2003

The revolving doors at his Interior Department and Environmental Protection Agency go 'round and 'round. In comes the dirt; out go the ethics.

At EPA, two senior officials helped gut clean-air rules for dirty old power plants this summer. The next week, they went to work for one such power plant owner -- one of the country's biggest air polluters -- and its law firm, which lobbied heavily for the rule change.

At Interior, the department's top lawyer stepped down last week amid an internal investigation into his conduct. The lawyer, William G. Myers III , was an ex-lobbyist who continued meeting with former clients from the cattle and mining industries. According to an ethics complaint, Myers allowed Interior to give illegal favors to a politically connected Wyoming rancher. Unlike the EPA guys, Myers doesn't have a new job yet. But Bush has nominated him for one: a seat on the U.S. 9th Circuit Court of Appeals.



Mooretown Rancheria
#1 Alverda Drive
Oroville, CA 95966
(530) 533-3625 Office
(530) 533-3680 Fax

January 26, 2004

The Honorable Patrick J. Leahy
Ranking Member
152 Senate Dirksen Office Building
Washington, DC 20510
Fax: 202-224-9516

RE: OPPOSITION to Nomination of William G. Myers III to the 9th Circuit Court of Appeals

Dear Senator:

On behalf of the Mooretown Rancheria, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people, and other Colorado River tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review or citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed-door meetings in which Glamis Gold, the applicant, and the National Mining Association, it's trade group, were granted extensive and exclusive access to the decision makers and their counsel prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

Mr. Myers' nomination is of great concern for several reasons:

1. Mr. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal governments grounded in the United States Constitution, federal statutes, adopted policy statement and trust responsibility.

2. As DOI Solicitor, it was his duty to advise DOI to consult with the tribe. The ability to understand these complex issues is particularly important for a lifetime judicial seat that encompasses nine western states and territories including California, scores of Indian reservations and lands, well over a hundred tribes, millions of Indian people and important federal and tribal lands management issues.

3. Mr. Myers' actions and legal advise in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage and sacred places.

4. As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contacts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

For these reasons, the Mooretown Rancheria respectfully requests that the Judiciary Committee oppose the conformation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California Indian tribes be invited to provide testimony on this important matter.

Sincerely,

Melvin Jackson
Vice Chairman
Mooretown Rancheria

Cc: California Nations Indian Gaming Association
Quechan Indian Nation

NATIONAL CONGRESS OF AMERICAN INDIANS

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Bois Forte Band of Chippewa Indians

NORTHEAST
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Seneca Nation

NORTHWEST
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Coeur d'Alene Tribe

PACIFIC
Leslie Lohse
Paskenta Band of Nomlaki Indians

ROCKY MOUNTAIN
Geri Small
Northern Cheyenne Tribe

SOUTHEAST
Eddie Tullis
Poarch Band of Creek Indians

SOUTHERN PLAINS
Zach Pahmahmie
Prairie Band Potawatomi Nation

SOUTHWEST
John F. Gonzales
San Ildefonso Pueblo

WESTERN
Arlan Melendez
Reno-Sparks Indian Colony

EXECUTIVE DIRECTOR
Jacqueline Johnson
Tlingit

NCAI HEADQUARTERS
1301 Connecticut Avenue, NW
Suite 200
Washington, DC 20036
202.466.7767
202.466.7797 fax
www.ncai.org

January 28, 2004

The Honorable Orrin Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: NCAI's Opposition to William G. Myers III to the 9th Circuit Court of Appeals

Dear Chairman Hatch and Ranking Member Leahy:

The National Congress of American Indians (NCAI) writes to express our opposition to the confirmation of William G. Myers III to the 9th Circuit Court of Appeals. I am attaching an NCAI resolution to this effect passed at NCAI's 60th Annual Convention this past November. (Resolution #ABQ-03-061).

NCAI believes that the President is entitled to receive the consent of the Senate for his judicial appointments unless there are serious concerns regarding judicial fitness. In our memory, NCAI has seldom, if ever, opposed a judicial nominee of any President. However, former Solicitor of Interior Myers' disregard for federal law affecting Native sacred places compels our view that he is unable to fairly and impartially apply the law and thus should not be confirmed.

As you know, the United States government has acquired ownership of hundreds of millions of acres of land formerly occupied by American Indian and Alaska Native tribes. Among these lands are sacred sites that are essential to the practice of numerous Native American religions. With this ownership, the government has assumed a vital stewardship responsibility for the maintenance and protection of sites of religious significance, a responsibility recognized in basic land management statutes such as the Federal Land Policy and Management Act (FLPMA).

As Solicitor of the Department of the Interior for the first two years of the Bush Administration, William G. Myers was the architect of a rollback of protections for sacred native sites on public lands that are central to the free exercise of religion for many Native American people. A glaring example is the recent decision by the Department of Interior to reconsider the denial of a permit for a massive cyanide heap leach gold mine that would destroy thousands of acres of land in the California desert, including 55 acres that are sacred to the Quechan Tribe. The original denial of a mining permit to Canada's Glamis Imperial Gold Company was the result of a multi-year process in which the Quechan Tribe and other concerned tribes actively participated.

In one of only three formal opinions issued by Myers in his two-year tenure at Interior, Myers reached the sweeping, and clearly erroneous conclusion that the

Glamis permit denial had to be reconsidered because the Bureau of Land Management (BLM) did not have authority under the FLMPA to prevent undue degradation of public lands that was necessary to a mining operation.

The issue concerns the meaning of the word "or" in the requirement of FLPMA that the Department of the Interior protect against public land degradation that is "unnecessary **or** undue." Myers's opinion—which overturned a well-reasoned legal opinion by his predecessor—wrote the term "undue" out of this statutory text, concluding that any practice necessary for a mining operation was by definition not "undue." While specifically addressing only the Glamis project, Myers' opinion will block BLM from preventing undue degradation of millions of acres of public land.

It's hard to imagine a more fundamental misreading of the language and intent of FLMPA. As federal district Judge Henry Kennedy Jr. – the only judge to have reviewed Myers's handiwork – has stated, "the Solicitor misconstrued the clear mandate of FLPMA" and failed to apply three "well-established canons of statutory construction." Rejecting Myers's analysis, the court held: "FLPMA by its plain terms, vests the Secretary of Interior with the authority—and indeed the obligation—to disapprove of an otherwise permissible mining operation because the operation, though necessary for mining, would unduly harm or degrade the public land." No wonder the American Bar Association has raised serious questions about Myers's legal qualifications for a position on the federal appellate bench.

Equally troubling to Native Americans is the shameful exclusion of the Quechan Indian Nation from the decision to reconsider the Glamis project. Neither Solicitor Myers nor Secretary Norton engaged in government-to-government consultation with the Quechan Indian Nation or other Colorado River tribes before reopening the Glamis debate.

The Ninth Circuit encompasses nine western states and other territories, including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii. It also contains scores of reservations, more than one hundred Indian tribes, millions of Indian people, and millions of acres of public lands. The Ninth Circuit is often the critical forum for deciding important federal and tribal land management issues. Myers' actions and legal advice in the Glamis matter reveal an activist preference for natural resource extraction that disrespects tribal values and raises serious questions about his ability to fairly and impartially decide cases affecting the public lands.

For these reasons, at our recent annual meeting, the National Congress of American Indians—the oldest and largest national organization of American Indian and Alaska Native tribal governments—approved a resolution formally opposing Myers's nomination to the Ninth Circuit. We do not take this step lightly – but when a nominee has acted with such blatant disregard for federal law and our sacred places, we must speak out.

Sincerely,

Tex G. Hall

Tex G. Hall

NATIONAL CONGRESS OF AMERICAN INDIANS

EXECUTIVE COMMITTEE

PRESIDENT
Tex G. Hall
Mandan, Hidatsa, and Arikara Nation

FIRST VICE-PRESIDENT
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San Ildefonso Pueblo

SOUTHERN PLAINS
Zach Pahmahmie
Prairie Band Potawatomi

ROCKY MOUNTAIN
Carl Small
Northern Cheyenne Tribe

ALASKA
Edward K. Thomas
Central Council of
Tlingit and Haida

MIDWEST
Norman Adams, Jr.
Bois Forte Band of Chippewa

EASTERN OKLAHOMA
Jefferson Keel
Chickasaw Nation

NORTHEAST
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1301 Connecticut Avenue, NW
Suite 200
Washington, DC 20036
202.466.7767
202.466.7797 fax
www.ncai.org

The National Congress of American Indians
Resolution #ABQ-03-061

TITLE: Opposition to Nomination and Confirmation of Interior Solicitor William G. Myers, III, To Ninth Circuit Court of Appeals

WHEREAS, we, the members of the National Congress of American Indians of the United States, invoking the divine blessing of the Creator upon our efforts and purposes, in order to preserve for ourselves and our descendants the inherent sovereign rights of our Indian nations, rights secured under Indian treaties and agreements with the United States, and all other rights and benefits to which we are entitled under the laws and Constitution of the United States, to enlighten the public toward a better understanding of the Indian people, to preserve Indian cultural values, and otherwise promote the health, safety and welfare of the Indian people, do hereby establish and submit the following resolution; and

WHEREAS, the National Congress of American Indians (NCAI) was established in 1944 and is the oldest and largest national organization of American Indian and Alaska Native tribal governments; and

WHEREAS, on May 15, 2003, President George W. Bush nominated Department of Interior Solicitor William G. Myers, III, to a not yet vacant seat on the Ninth Circuit Court of Appeals to replace Thomas Nelson of Idaho who will be retiring; and

WHEREAS, Solicitor Myers' October 23, 2001, Solicitor's Opinion advising the revocation of the prior Solicitor Leshy Opinion and rescission of the denial of the plan of operations protecting Quechan Indian Pass from the proposed Glamis Imperial Gold Mine in the southeastern California desert was relied upon by Interior Secretary Gale Norton in rescinding the denial of the mine so that it could be reconsidered; and

WHEREAS, neither Solicitor Myers nor Secretary Norton's offices, unlike their predecessor, engaged in government-to-government consultation with the Quechan Indian Nation, a federally-recognized tribe, nor other Colorado River Tribes, before taking action to imperil the sacred places at Quechan Indian Nation, a federally-recognized tribe, nor other Colorado River Tribes, before taking action to imperil the sacred places at Quechan Indian Pass; and

WHEREAS, a similar reversal of final agency action by the Department of Interior to Northern California tribes relative to a Medicine Lake Highlands geothermal project occurred during the same period; and

WHEREAS, Ninth Circuit Court of Appeals encompasses nine western states and other territories including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, and Guam, scores of reservations, well over one hundred Indian tribes, millions of Indian people, millions of acres of public lands and important federal and tribal lands management issues, and

WHEREAS, an appointment to the federal bench is a lifetime appointment; and

WHEREAS, Solicitor Myers' actions in the Glamis matter show a deep lack of respect and understanding of the unique political relationship between the federal government and tribal governments; and

WHEREAS, by prior NCAI Resolutions NCAI has strongly supported the Quechan people in their struggle to protect their sacred places at Quechan Indian Pass (Resolution #SPO-01-162 and Resolution #SD-02-018); and

WHEREAS, Solicitor Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage, actions and advice that reveals an activist point of view that disrespects tribal values that should not be reflected on the federal bench; and

WHEREAS, Solicitor Myers has demonstrated an inability to set aside personal bias to act in a neutral and objective manner and on October 1, 2003, resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contracts with former clients including the National Mining Association, and

WHEREAS, on October 23, 2003, the CNIGA member tribes approved a resolution OPPOSING the nomination of William G. Myers, III, and a letter to be sent to the Senate Judiciary Committee expressing that view and for other related actions to be taken; and

WHEREAS, NCAI recognizes that the appointment of Solicitor Myer will not be in the best interest of the Tribes of the United States; that Tribes need to become more active in the judicial nomination and confirmation processes especially given recent trends in circuit and the Supreme courts; and that this is another way for tribal nations to protect their sovereignty.

NOW THEREFORE BE IT RESOLVED, that the NCAI does hereby supports the California Tribes and hereby opposes the nomination and confirmation of William G. Myers, III, as Judge for the Ninth Circuit Courts of Appeals or any federal judgeship; and

BE IT FURTHER RESOLVED, that NCAI will immediately urge President Bush to reconsider and withdraw Mr. Myers' nomination; and

BE IT FURTHER RESOLVED, that NCAI will immediately convey its opposition of the nomination to the Senate Judiciary Committee and request to be made part of the confirmation hearing process; and

BE IT FURTHER RESOLVED, that NCAI will work with CNIGA, other interested groups and the media to oppose the nomination; and

BE IT FURTHER RESOLVED, that this resolution shall be the policy of NCAI until it is withdrawn or modified by subsequent resolution; and until the aforementioned nomination is withdrawn from consideration by the Administration.

CERTIFICATION

The foregoing resolution was adopted at the 60th Annual Session of the National Congress of American Indians, held at the Albuquerque Convention Center, Albuquerque, New Mexico, on November 21, 2003 with a quorum present.

Tex G. Hall
President

ATTEST:

Juana Majel
Recording Secretary

Adopted by the General Assembly during 60th Annual Session of the National Congress of American Indians, held in Albuquerque, New Mexico, from November 17-21, 2003.

Paskenta Band of Nomlaki Indians
P.O. Box 398
Orland, CA 95963
Phone: (530) 865-2010 Fax: (530) 865-1870

January 28, 2004

The Honorable Patrick J. Leahy Ranking Member
152 Senate Dirksen Office Building
Washington, DC 20510

RE: OPPOSITION to Nomination of William G. Myers III to the 9th Circuit Court of Appeals.

Dear Senator Leahy:

On behalf of the Paskenta Band of Nomlaki Indians of California, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people and other Colorado River tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review of citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed-door meetings in which Glamis Gold, the applicant, and the National Mining Association, its trade group, were granted extensive and exclusive access to the decision makers and their counsel prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

Mr. Myers' nomination is of great concern for several reasons:

1. Mr. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal governments grounded in the United States Constitution, federal statues, adopted policy statements and trust responsibility.

2. As DOI Solicitor, it was his duty to advise DOI to consult with the tribe. The ability to understand these complex issues is particularly important for a lifetime judicial seat that encompasses nine western states and territories including California, scores of Indian reservations and lands, well over a hundred Indian tribes, millions of Indian people and important federal and tribal lands management issues.

3. Mr. Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage and sacred places.

4 As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor and federal investigations into alleged violations of his ethics agreements by having contacts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

For these reasons, the Paskenta Band of Nomlaki Indians of California respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California Indian tribes be invited to provide testimony on this important matter.

Sincerely,

Everett Freeman

Everett Freeman
Tribal Chairperson
Paskenta Band of Nomlaki Indians of California

Cc: California Nations Indian Gaming Association
Quechan Indian Nation



PEER
Public Employees for Environmental Responsibility
2001 S Street, NW • Suite 570 • Washington, D.C. 20009 • 202-265-PEER(7337) • fax: 202-265-4192
e-mail: info@peer.org • website: http://www.peer.org

Senator Orrin G. Hatch
Chairman – Senate Committee on the Judiciary
SH-104 Hart Senate Office Building
Washington, DC 20510

Senator Patrick J. Leahy
Ranking Minority Member - Senate Committee on the Judiciary
SR-433 Russell Senate Office Building
Washington, DC 20510

September 3, 2003

Dear Senators:

Public Employees for Environmental Responsibility (PEER) is writing to communicate our opposition to the nomination of William G. Myers to serve as a judge on the U.S. 9th Circuit Court of Appeals. The basis of our opposition is dereliction of duty by Mr. Myers in his current position as Solicitor to the U.S. Department of Interior.

Specifically, Mr. Myers oversaw and approved a settlement agreement with a Wyoming-based rancher that —

- Violates federal law and regulation;
- Disrupts protection of important public resources while improperly ceding public assets to private use; and
- Fails to protect federal employees from continuing harassment.

In March 2002, a Bureau of Land Management (BLM) review team was dispatched from headquarters to review complaints by a BLM permittee, Mr. Frank Robbins of Thermopolis, Wyoming, that the local BLM office in Worland had abused its authority in enforcing rangeland regulations against him. That review team endorsed the actions of the Worland BLM Office and even recommended the agency consider criminal prosecution of Mr. Robbins [ATTACHMENT I].

Notwithstanding the findings of the BLM review team, Mr. Myers' Office of the Solicitor initiated settlement negotiations with Mr. Robbins that —

- Conditionally forgave Mr. Robbins a string of 16 grazing violations dating back to his first appearance in Wyoming in 1994;
- Awarded Mr. Robbins –

- A new grazing allotment;
- Management control ("additional flexibility" in the words of the agreement) over certain federal lands;
- Rights of way across federal lands without reciprocal easements for the BLM;
- Preferential grazing fees;
- A Special Recreational Permit to run a "dude ranch"; and
- A promise to facilitate a land exchange.

- Accorded Mr. Robbins special status whereby only the Director of BLM, or her designee, could cite Mr. Robbins for future violations. [ATTACHMENT II]

This outrageously one-sided arrangement omitted any settlement of criminal charges Mr. Robbins has been pressing against individual current and former employees. In addition, the agreement did stipulate that, despite the findings of the BLM headquarters review, the Worland Office range conservationist who processed Mr. Robbins' prior citations be reassigned.

Not only did the Robbins agreement undermine consistent and responsible public lands range management, it impermissibly gave concessions and considerations to Mr. Robbins that are contrary to federal law and regulation. [ATTACHMENT III]

As a former lobbyist for the public lands livestock industry, Mr. Myers would be acutely aware of the significance of the concessions that the agreement his office negotiated awarded to Mr. Robbins. Further, Mr. Myers' calendar records his personal attention to the Robbins agreement. [ATTACHMENT IV]

PEER urges every member of the Senate Judiciary Committee to examine the attached agreement and the included supporting materials. PEER believes that any dispassionate examination of this agreement reveals that Mr. Myers has sacrificed the interests of the people of the United States, who are supposed to be his client as Interior Solicitor, to serve the interests of a private individual — and a livestock industry that he used to represent in private practice.

Precisely because Mr. Myers has chosen to place his private prejudices above his sworn public duties, PEER urges the Judiciary Committee to reject his nomination to serve the 9th Circuit Court of Appeals.

Sincerely,

Jeffrey Ruch
Executive Director

Cc. Members Senate Judiciary Committee

Office of:
The Governor
The Secretary
The Treasurer

Pueblo of Laguna
P. O. Box 194
Laguna, NM 87026

(505) 552-6598
(505) 552-6654
(505) 552-6655

February 2, 2004

Senator Patrick Leahy, Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
1st & C Street, NE
Washington, D.C. 20510

FAX: (202) 224-3479

Dear Senator Leahy

The Pueblo of Laguna writes to express our opposition to the confirmation of William G. Myers III to the 9th Circuit Court of Appeals. Former Solicitor of Interior Myers' disregard for federal law affecting Native sacred places compels our view that he is unable to fairly and impartially apply the law and thus should not be confirmed

As Solicitor of the Department of the Interior, William G. Myers was the architect of a rollback of protections for sacred native sites on public lands that are central to the religion of many Native American people. In one of only three formal opinions issued by Myers in his two-year tenure at Interior, Myers reached the clearly erroneous conclusion that the Bureau of Land Management (BLM) does not have authority under the Federal Land Policy and Management Act (FLPMA) to prevent undue degradation of public lands and protect sites of religious significance to Native Americans.

Myers' opinion – which overturned a well-reasoned legal opinion by his predecessor – wrote the term "undue" out of the statutory text, concluding that any practice necessary for a mining operation was by definition not "undue". It is hard to imagine a more fundamental misreading of the language and intent of FLMPA. No wonder the American Bar Association has raised serious questions about Myers' legal qualifications for a position on the federal appellate bench. Equally troubling to Native Americans is the shameful exclusion of the Quechan Indian Nation and other tribes from the decision to reconsider the Glamis mine project.

The Ninth Circuit encompasses nine western states and other territories, including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii. It also contains scores of reservations, more than one hundred Indian tribes, millions of Indian people, and millions of acres of public lands. The Ninth Circuit is often the

critical forum for deciding important federal and tribal land management issues. Myers' actions and legal advice in the Glamis matter reveal an activist preference for natural resource extraction that disrespects tribal values and raises serious questions about his ability to fairly and impartially decide cases affecting the public lands.

For these reasons, we formally oppose Myers' nomination to the Ninth Circuit. We do not take this step lightly – but when a nominee has acted with such blatant disregard for federal law and Native American sacred places, we must speak out.

Sincerely,

PUEBLO OF LAGUNA

Roland E. Johnson
Governor

QUECHAN INDIAN TRIBE
Ft. Yuma Indian Reservation

P.O. Box 1899
Yuma, Arizona 85366-1899
Phone (760) 572-0213
Fax (760) 572-2102

Honorable Senator Dianne Feinstein
Honorable Senator Jon Kyl
U.S. Senate Judiciary Committee Members

January 28, 2004

RE: Quechan Indian Nation OPPOSITION to Confirmation of William G. Myers III to the Ninth Circuit Court of Appeals

Dear Honorable Senators:

The Quechan Indian Nation of California and Arizona wishes to express its strong opposition to the nomination of William G. Myers III to the Ninth Circuit Court of Appeals. We understand that his confirmation hearing may be held as early as February 4, 2004. Because you both represent many tribes, including the Quechan Nation, and the Ninth Circuit deals with many issues of great concern to all of Indian Country, the Quechan People trust that once you learn of Mr. Myers' poor record on Indian issues, you will agree that he is the wrong person for this important Court and its lifetime appointment.

As you will remember, former Interior Solicitor Myers' controversial 2001 Hardrock Mining Solicitor's Opinion was the legal advice and recommendation that Secretary Norton specifically and solely relied upon to rescind the denial of the Glamis Imperial Mine. Myers' advice, once again put at risk of destruction the sacred places of the Quechan Nation and other Colorado River Tribes. As a result, the National Trust for Historic Preservation listed the Quechan Indian Pass area as one of the eleven most endangered historic places in American in 2002. Myers' legal Opinion was appalling, and result-reaching, for several reasons.

First, he rendered that Opinion without any government to government consultation or even a meeting with the Tribe, despite: Having been requested to do so by the Tribe, the notoriety of the matter and the trust obligation of the Department of Interior to the Tribe. Second, as Solicitor, the people of the United States were his clients: He had an obligation to honor the requirement of the Congressionally-designated California

QUECHAN INDIAN NATION FAX:760-572-2102

Desert Conservation Area Plan. Yet, Myers disregarded the Plan, the governing standards and the litany of unmitigable environmental and cultural resource impacts to advance the economic position of one specific company over the broad interests of the public in preserving this irreplaceable desert landscape. Indian Pass remains threatened today because of the Former Solicitor's unsupported legal advice.

Mr. Myers has demonstrated a clear lack of the legal integrity that must be demanded of our judiciary. We respectfully request that you give Mr. Myers a vigorous hearing and ultimately oppose his nomination. Should you want to speak directly to us about our position, please phone me directly at 760.572.0213 or our attorney Courtney Coyle at 858.454.8687. Thank you for your consideration.

Sincerely yours,

Mike Jackson Sr., President
Quechan Indian Nation

Cc: Members of the Senate Judiciary Committee
Honorable Senator Barbara Boxer
Honroable Senator John McCain
Honorable Senator Campbell
Honorable Senator Inouye
Pauline Jose, Culture Committee Chair
Emilio Escalanti, Council Liaison

QUECHAN INDIAN NATION Fax:760-572-2102



January 27, 2004

The Honorable Patrick J. Leahy
Ranking Member
152 Senate Dirksen Office Building
Washington, DC 20510

Via Fax: (202) 224-9516

Re: OPPOSITION to Nomination of William G. Myers III to the 9th Circuit Court of Appeals

Dear Senator Leahy,

On behalf of the Redding Rancheria Tribe, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor a the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people and other Colorado River tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe of California and Arizona, despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposal nor engage in any type of public review or citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed-door meetings in which Glamis Gold, the applicant, and the National Mining Association, its trade group, were granted extensive and exclusive access to the decision makers and their council prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

2000 Redding Rancheria Rd. Redding, CA 96001 Tribal Office: 530-225-8979 Fax: 530-241-1879

Mr. Myers' nomination is of great concern for several reasons:

1. Myers' actions in the Glamis matter show a lack of understanding and respect for the unique political relationship between the federal government and tribal governments grounded in the United States Constitution, federal statutes, adopted policy statements and trust responsibility.

2. As DOI Solicitor, it was his duty to advise DOI to consult with the tribe. The ability to understand these complex issues is particularly important for a lifetime judicial seat that encompasses nine western states and territories including California, scores of Indian reservations and lands, well over a hundred Indian tribes, millions of Indian people and important federal and tribal lands management issues.

3. Mr. Myers' actions and legal advice in the Glamis matter could result in the extinguishment of the Quechan people's tribal heritage and sacred places.

4. As DOI Solicitor, Mr. Myers has demonstrated an inability to put aside personal bias to act in a neutral and objective way and in the public interest. That he has recently resigned his position as Solicitor amid federal investigations into alleged violations of his ethics agreements by having contacts with former clients underscores that he is just too close to the extractive industries and shows a lack of judicial temperament.

For these reasons, the Redding Rancheria Tribe respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California tribes be invited to provide testimony on this important matter.

Sincerely,

Tracy Edwards

Tracy Edwards
Tribal Chair
Redding Rancheria

Cc: California Nations Indian Gaming Association
Quechan Indian Nation

San Pasqual Band of Mission Indians

Tribal Government -- San Diego County, California
P.O. Box 365 Valley Center, CA 92082
PH. (760) 749-3200 - FAX (760) 749-3876

Business Committee

Allen E. Lawson
Spokesman

Patricia Ockert
Vice-Chairwoman

Valerie Juarez
Secretary-Treasurer

Cheryl Calac
Delegate

Catalina Campos
Delegate

January 30, 2004

The Honorable Patrick J. Leahy
Ranking Member
152 Senate Dirksen Office Building
Washington, DC 20510

Re: OPPOSITION to Nomination of William G. Myers III to the 9th Circuit Court of Appeals

Dear Senator Leahy:

On behalf of the San Pasqual Band of Mission Indians, I write to oppose the confirmation of William G. Myers III to 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the could be reconsidered. Mr. Myers' Opinion ignored Congress intent to protect the California desert and completely disregarded the rights and interest of the Quechan Indian Nation and its people and other Colorado River tribes.

In rescinding the denial of the mine, neither Secretary Norton nor Solicitor Myers, unlike their predecessors, engaged in government-to-government consultation with the Quechan Indian Nation, a federally recognized tribe of California and Arizona despite the seriousness of the action undertaken by Norton and Myers to strip away the hard-fought protection of this sacred place. Neither did they consult with the State of California who had expressed strong concerns about the proposals nor engage in any type public review or citizen process.

Solicitor Myers and the Department of Interior did, however, hold closed-door meeting in which Glamis gold, the applicant, and the National Mining Association, its trade group, were granted extensive and exclusive access to the decision makers and their counsel prior to the reversals taking place. A similar reversal also occurred to Northern California tribes relative to a Medicine Lake Highlands geothermal project during this same period.

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For these reasons, The San Pasqual Band of Mission Indians respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California Indian tribes be invited to provide testimony on this important matter.

Sincerely,

Allen E. Lawson,
Tribal Chairman

cc: California Nations Indian Gaming Association
Quechan Indian Nation

SANTA YSABEL BAND OF DIEGUENO INDIANS

Johnny M. Hernandez
Spokesman

Brandie S. Taylor
Vice Spokeswoman

Bonnie Salgado
Councilwoman

Tracts 1, 2 and 3
P. O. Box 130
Santa Ysabel, CA 92070
Tele: (760) 765-0845 • Fax: (760) 765-0320

Sylvia Sherbert
Treasurer

H. Lamar Price
Secretary

Rodney J. Kephart
Councilman

January 21, 2004

Re: OPPOSITION to Nomination of William G. Myers III to the 9th Circuit Court of Appeals

Dear Honorable Patrick Leahy:

On behalf of the Santa Ysabel Band of Diegueno Indians, I write to oppose the confirmation of William G. Myers III to the 9th Circuit Court of Appeals.

As Solicitor at the Department of Interior, Mr. Myers handled the proposed Glamis Imperial Project gold mine in Southeastern California, which would have destroyed a tribal sacred place. Mr. Myers' October 2001 Solicitor's Opinion revoked the prior Solicitor Leshy Opinion protecting Indian Pass. The revocation was expressly relied upon by Interior Secretary Gale Norton to rescind the denial of the mine, so that the mine could be reconsidered. Mr. Myers' Opinion ignored Congress' intent to protect the California desert and completely disregarded the rights and interests of the Quechan Indian Nation and its people and other Colorado River tribes.

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For these reasons, the Santa Ysabel Band of Diegueno Indians respectfully requests that the Judiciary Committee oppose the confirmation of Mr. Myers to this important lifetime appointment. We also respectfully ask that California Indian tribes be notified prior to the date of confirmation hearings. Finally, we ask that representatives of California Indian tribes be invited to provide testimony on this important matter.

Sincerely,

Johnny Hernandez
Chairperson

Cc: California Nations Indian Gaming Association
Quechan Indian Nation

Seminole Nation of Oklahoma
POST OFFICE BOX 1498
WEWOKA, OKLAHOMA 74884

Executive Department

KEN CHAMBERS, PRINCIPAL CHIEF
MARY ANN EMARTHLA, ASSISTANT CHIEF

PHONE 405/ 257-6287
FAX 405/ 257-6205

February 02, 2004

Post-it® Fax Note 7671	Date 2-2-04 # of pages ▶ 2
To Sen. Leahy	From Ken Chambers
Co./Dept.	Co.
Phone #	Phone #
Fax # 202-224-3479	Fax #

Hon. Patrick Leahy (Ranking Member)
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

The Seminole Nation of Oklahoma writes to express our opposition to the confirmation of William G. Myers III to the 9th Circuit Court of Appeals. Former Solicitor of Interior Myers' disregard for federal law affecting Native sacred places compels our view that he is unable to fairly and impartially apply the law and thus should not be confirmed.

As Solicitor of the Department of the Interior, William G. Myers was the architect of a rollback of protections for sacred native sites on public lands that are central to the religion of many Native American people. In one of only three formal opinions issued by Myers in his two-year tenure at Interior, Myers reached the clearly erroneous conclusion that the Bureau of Land Management (BLM) does not have authority under the Federal Land Policy and Management Act (FLPMA) to prevent undue degradation of public lands and protect sites of religious significance to Native Americans.

Myers' opinion—which overturned a well-reasoned legal opinion by his predecessor—wrote the term "undue" out of the statutory text, concluding that any practice necessary for a mining operation was by definition not "undue." It is hard to imagine a more fundamental misreading of the language and intent of FLMPA. No wonder the American Bar Association has raised serious questions about Myers' legal qualifications for a position on the federal appellate bench. Equally troubling to Native Americans is the shameful exclusion of the Quechan Indian nation and other tribes from the decision to reconsider the Glamis mine project.

The Ninth Circuit encompasses nine western states and other territories, including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii. It also contains scores of reservations, more than one hundred Indian tribes, millions of Indian people, and millions of acres of public land. The Ninth Circuit is often the critical forum for deciding important federal and tribal land management issues. Myers' actions and legal advice in the Glamis matter reveal an activist preference for natural resource extraction that disrespects tribal values and raises serious questions about his ability to fairly and impartially decide cases affecting the public lands.

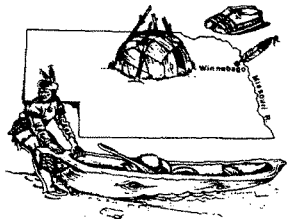
For these reasons, we formally oppose Myers' nomination to the Ninth Circuit. We do not take this step lightly—but when a nominee has acted with such blatant disregard for federal law and Native American sacred places, we must speak out.

Sincerely,

Ken Chambers, Principal Chief
Seminole Nation of Oklahoma

WINNEBAGO TRIBE of NEBRASKA

WINNEBAGO TRIBAL COUNCIL P.O. BOX 687 WINNEBAGO, NEBRASKA 68071



February 2, 2004

Senator Patrick Leahy, Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

The Winnebago Tribe of Nebraska writes to express our opposition to the confirmation of William G. Myers III to the 9th Circuit Court of Appeals. Former Solicitor of Interior Myers' disregard for federal law affecting Native sacred places compels our view that he is unable to fairly and impartially apply the law and thus should not be confirmed.

As Solicitor of the Department of the Interior, William G. Myers was the architect of a rollback of protections for sacred native sites on public lands that are central to the religion of many Native American people. In one of only three formal opinions issued by Myers in his two-year tenure at Interior, Myers reached the clearly erroneous conclusion that the Bureau of Land Management (BLM) does not have authority under the Federal Land Policy and Management Act (FLPMA) to prevent undue degradation of public lands and protect sites of religious significance to Native Americans.

Myer's opinion – which overturned a well-reasoned legal opinion by his predecessor-wrote the term "undue" out of the statutory text, concluding that any practice necessary for a mining operation was by definition not "undue." It is hard to imagine a more fundamental misreading of the language and intent of FLMPA. No wonder the American Bar Association has raised serious questions about Myer's legal qualifications for a position on the federal appellate bench. Equally troubling to Native Americans is the shameful exclusion of the Quechan Indian Nation and other tribes from the decision to reconsider the Glamis mine project.

The Ninth Circuit encompasses nine western states and other territories, including California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii. It also contains scores of reservations, more than one hundred Indian tribes, millions of Indian people, and millions of acres of public lands. The Ninth Circuit is often the critical forum for deciding important federal and tribal land management issues. Myers' actions and legal advice in the Glamis matter reveal an activist preference for natural resource extraction that disrespects tribal values and raises serious questions about his ability to fairly and impartially decide cases affecting the public lands.

For these reasons, we formally oppose Myer's nomination to the Ninth Circuit. We do not take this step lightly – but when a nominee has acted with such blatant disregard for federal law and Native American sacred places, we must speak out.

Sincerely,

John Blackhawk, Chairman
Winnebago Tribe of Nebraska



VAN HYNING

Senator Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510

June 1, 2003

SUBJ: Circuit Court of Appeals Bush Nominatee

Dear Senator Leahy:

I am writing in response to President Bush's nominee William Myers III to the 9th U.S. Circuit Court of Appeals announced May 17, 2003. President Bush should withdraw Myers' name from nomination, or that notwithstanding, the Senate Judiciary committee must vote "not" to move this nomination to the full Senate for conformation. Confirming William Myers to the 9th U.S. Circuit Court of Appeals would be like appointing Saddam Husseine to the U.S. Cabinet post of Homeland Security. Both have long historical records of their personal convictions not being in the best interest of the public.

I grew up on a ranch in the Lewistown, Montana area and have worked as a volunteer with a local conservation organization with grazing issues on public land for many years. I have participated in Forest Service and Bureau of Land Management (BLM) grazing\watershed environmental analyses throughout central Montana. I have worked directly with ranchers who are permittees and agency specialists who are both working to improve multi-use on public lands.

Mr. Myers first appeared on my radar screen when BLM March 3, 2003 published "Notices on Potential Changes to Grazing Regulations". Among other things these proposed rules call for "authorize temporarily locked gates on public lands." Mr. Myers is currently the Interior Department's top lawyer (Solicitor).

In 1994, then Interior Secretary Bruce Babbitt revised the BLM's grazing regulations to ensure that livestock use would be balanced with other resources in order to improve the health of BLM Rangelands. The public lands livestock industry objected strongly to the final rules and challenged them in court, taking the case all the way to the U.S. Supreme Court in 2000. In Public Lands Council et v. Babbitt et (167F.3d 1287-10th Cir 1999), found unanimously on every complaint for the Secretary. Mr. Myers was director of the Public Lands Council and federal lands director of the National Cattlemen's Beef Association when his law firm, Holland & Hart Firm in Boise Idaho filed a friend-of-the court brief on behalf of the Farm Credit Banks in support of the cattlemen's lawsuit.

Mr Myers now as Solicitor of the Interior Department is pushing new grazing guidelines (FR Doc.03-4933 Filed 2-28-03: 8:45am) to reverse the entire Supreme Court 2000 decisions.

Do not confirm Mr. Myers, who has no judicial experience and whose only background is moving public resources to private wealth.

Sincerely,
Dyrck Van Hying

VAN HYNING & ASSOC., INC.
P.O. Box 2931 (59403)
6835 43rd St. S.W.
Great Falls, MT 59404
(406) 453-6039 FAX (406) 452-8565

NOMINATIONS OF DIANE S. SYKES, OF WISCONSIN, NOMINEE TO BE CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT; JAMES L. ROBART, OF WASHINGTON, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON; AND JUAN R. SANCHEZ, OF PENNSYLVANIA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WEDNESDAY, FEBRUARY 11, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:15 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch, Specter, Craig, Kohl, and Feingold.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. I apologize for being a little bit late. I just could not get away from where I was.

We are pleased to welcome to the Committee this afternoon three outstanding nominees, one for the Federal appeals court bench and two for the district court bench. And I will speak about each of them in just a minute, and can we hold our remarks until our colleagues are able to say theirs? Is that okay with you?

Senator SPECTER. I am one of your colleagues.

Chairman HATCH. Well, I think that is a good idea.

Senator SPECTER. Both ways: on the Committee and introducing one of the nominees.

Chairman HATCH. That is great. Well, then, we will start with Hon. Arlen Specter. Then we will go to Hon. Rick Santorum, then Hon. Herb Kohl, if he is here. Well, since it is Wisconsin, I think we will honor the Chairman of the House Judiciary Committee and go to him. and then if Senator Feingold shows up, then we will do him.

Senator SPECTER. He is here.

[Laughter.]

Chairman HATCH. You can say, "I am late." Okay. Senator Feingold will be next, then Hon. Senator Patty Murray, and then finally

Hon. Maria Cantwell. So we go in that order. We will put, Congressman Sensenbrenner, right after Senators Kohl and Feingold, if that would be all right. So we can keep that all together.

We will start with you, Senator Specter.

PRESENTATION OF JUAN R. SANCHEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman, and thank you for convening these hearings and the prompt listing of the judicial nominees. With the many problems facing the Federal courts, it is very important to keep the nominees going, and you have done an outstanding job under difficult circumstances.

Senator Santorum and I have the honor to introduce State Common Pleas Court Judge Juan Sanchez for the United States District Court for the Eastern District of Pennsylvania. Judge Sanchez comes to this position with an excellent academic, professional, and judicial background. He was born in Puerto Rico, came to the United States, and attended the City College of New York, graduating in 1978 cum laude; a law degree from the University of Pennsylvania; and since that time, has had a diversified practice in the civil practice with the Public Defender's Office, with the Legal Aid Society, the sole proprietor of a law firm, and more recently for 6 years being a very distinguished judge of the State court, the Common Pleas Court of Chester County.

Judge Sanchez has moved through the process on the bipartisan nominating panel which Senator Santorum and I have established. The President has submitted his name to the Senate because of his outstanding qualifications and also in the interest of diversity.

A very large group of proud Chester County officials have come here today: William H. Lamb, a former Associate Justice of the Supreme Court of Pennsylvania, his most prominent position when he was a fellow district attorney with Arlen Specter in the good old days in Philadelphia; James McErlane; Skip Brion, the Chairman of the Chester County Republican Group; three of the judges, fellow judges from the Court of Common Pleas—President Judge Riley, Judge Ott, and Judge Mann. And I would go on and list everybody here, but there are a lot of people waiting to make their presentations. But it is a great pleasure to introduce Judge Sanchez to this panel and to urge his speedy confirmation.

Thank you, Mr. Chairman.

Chairman HATCH. Thank you, Senator Specter.

We will go to Senator Santorum, then Senator Kohl, and then Senator Feingold.

PRESENTATION OF JUAN R. SANCHEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA, BY HON. RICK SANTORUM, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SANTORUM. Thank you, Mr. Chairman. It is an honor for me to be here to introduce to the Committee Judge Juan Sanchez. And even though he is a native Puerto Rican and grew up in New York, he was wise enough to begin to practice law in Chester Coun-

ty, Pennsylvania, and has a distinguished record that Senator Specter outlined. And I just want to add the tremendous amount of work that he has done in community service. Chester County has a large migrant worker population, largely Hispanic population, and Judge Sanchez has done a lot in the area of bilingual education at the YMCA and a lot of other things to really help integrate that community and has really been an outstanding role model for many members of that community in Chester County. And he has a distinguished legal record that Senator Specter—academic and legal record. He was unanimously well qualified by the American Bar Association. He has a distinguished time as a trial court judge in a large suburban county, Chester County. And as Senator Specter said, he has tremendous support—Republican, Democrat, across the board. When we asked for a suggestion for judge in Chester County—it was sort of their time as a large suburban county to have one of these vacancies—there was unanimous support for Judge Sanchez because of not just his great legal ability and his excellent record but, candidly, because of the tremendous community service that he has provided and the great model that he is in that county.

And so it is a pleasure for me to be here to support his nomination.

Chairman HATCH. Thank you, Senator Santorum. That is heady praise for our nominee, and I appreciate both of you being here and appreciate your busy schedules.

We will turn to Senator Kohl at this time.

PRESENTATION OF DIANE S. SYKES, NOMINEE TO BE CIRCUIT COURT JUDGE FOR THE SEVENTH CIRCUIT, BY HON. HERB KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you, Mr. Chairman. Along with Senator Feingold and Chairman Sensenbrenner, it is my pleasure to introduce Wisconsin Supreme Court Justice Diane Sykes to the Senate Judiciary Committee today. She has been nominated to fill one of the Wisconsin seats on the Seventh Circuit Court of Appeals to replace retiring Judge John Coffey.

Justice Sykes brings an impressive background to this important position. She is a lifelong resident of Wisconsin. She was born in Milwaukee, attended Marquette University Law School, clerked for Federal Judge Terry Evans in Milwaukee, and practiced law for a Wisconsin law firm at the very top rank.

Justice Sykes left private practice in 1992 to serve as a Milwaukee County circuit judge, a position she held until 1999. She was then appointed to the Wisconsin Supreme Court in 1999, and she won re-election to a 10-year term in the year 2000. She is to be commended for her devotion to public service and praised for her qualifications for the Seventh Circuit Court of Appeals.

We are not the only ones who recognize her abilities today. The bipartisan Wisconsin Federal Nominating Commission, which has been screening judicial candidates for Wisconsin Senators of both parties for 25 years, selected Justice Sykes and three others from a very impressive list of applicants for this position. All four finalists were very well qualified, and all deserved to have their names forwarded to the President for his selection. Wisconsin's process

should be a model, Mr. Chairman, because it finds qualified applicants and takes much of the politics out of judicial selection.

The American Bar Association agrees with our evaluation as well. A substantial majority of the Committee rated her well qualified. Mr. Chairman, we expect Justice Sykes to not only be a credit to Wisconsin, but also to administer fair justice for all who come before her. We look forward to Justice Sykes' hearing today and ultimately her support by the full Senate.

I thank you and I ask unanimous consent that Senator Leahy's statement be recorded.

Chairman HATCH. Thank you so much. We will put that in the record and record it.

Senator Feingold, and then Congressman Sensenbrenner.

PRESENTATION OF DIANE S. SYKES, NOMINEE TO BE CIRCUIT COURT JUDGE FOR THE SEVENTH CIRCUIT, BY HON. RUSSELL FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. It is also my privilege to welcome Justice Diane Sykes to this hearing and to introduce her to the Committee.

Justice Sykes is a true product of Wisconsin. She was born in Milwaukee and attended Brown Deer High School. She left our State to go to college at Northwestern University only, but then she returned to work as a reporter for the Milwaukee Journal and then to attend Marquette University Law School where she was a member of the law review.

After law school, she clerked for Judge Terry Evans, then a U.S. District Judge for the Eastern District of Wisconsin. So if Justice Sykes is confirmed to the Seventh Circuit, Judge Evans will be her colleague on that court.

After clerking, Justice Sykes practiced law for 7 years with the Milwaukee firm of Whyte and Hirschboeck. In 1992, as Senator Kohl indicated, she was elected to a circuit court judgeship in Milwaukee County, and then in September 1999 then-Governor Tommy Thompson named her to a vacancy on the Wisconsin Supreme Court. She was re-elected in the year 2000 and she continues to serve on the highest court in our State.

Mr. Chairman, I think it is important to note, as Senator Kohl noted, that Justice Sykes' nomination is the result of a collaborative, bipartisan process of judicial selection in our State. The Wisconsin Federal Nominating Commission was first formed nearly a quarter century ago by former Senators William Proxmire and Gaylord Nelson. It has been used continuously since that time by Democratic and Republican Senators under both Democratic and Republican Presidents. The Wisconsin Federal Nominating Commission is an independent panel selected by Wisconsin elected officials and the State Bar of Wisconsin. The commission charter provides that it will review applications for Federal district court and court of appeals vacancies in Wisconsin, as well as United States Attorney vacancies.

Senator Kohl and I have worked very hard to maintain and strengthen the commission throughout our time in the Senate. The composition of the commission assures that selections for these im-

portant positions will be made based on merit, not politics. Over the past 25 years, the commission process has yielded very high quality nominees and has served to depoliticize the nomination process in our State. Despite some initial resistance, the Bush administration ultimately agreed to have candidates for the Seventh Circuit vacancy go through the commission process.

Under the joint leadership of Dean Joseph Kearney of the Marquette University Law School and Professor Frank Tuerkheimer of the University of Wisconsin Law School, the commission worked extremely hard under a very tight deadline. As Senator Kohl indicated, they recommended four highly qualified candidates, including Justice Sykes. Senator Kohl and I, working with Representative Sensenbrenner, the senior Republican officer holder in the State, decided to forward all four names to the White House, and then President Bush selected Justice Sykes from the four.

I have always maintained that with cooperation and consultation between the President and home State Senators, the judicial nomination process can be far less contentious and, frankly, far less frustrating than it has been over the past several years. Recognizing that ideological differences are inevitable in the process, as control in the Senate and the White House changes hands, it would serve those who choose and confirm Federal judicial nominees well to follow this example of the Wisconsin Federal Nominating Commission.

I met with Justice Sykes last summer as a part of the commission process. I had a chance to question her closely about her background, her qualifications, and her judicial philosophy. Certainly there are a number of topics on which we do not see eye to eye. But I found Justice Sykes to be candid and forthcoming, and I believe she is well qualified to fill this seat on the Seventh Circuit. I have great respect for Justice Sykes' commitment to public service. Talented young lawyers have many more options that they could pursue for far more compensation. But Justice Sykes is one of this group who have chosen public service. I also have great respect for the commission process, and I fully support Justice Sykes' nomination.

Mr. Chairman, it is my hope that the work of the Wisconsin Federal Nominating Commission, the nomination of Justice Sykes, and her smooth confirmation will send a signal to the White House and to my colleagues on both sides of the aisle and to the country that we can, in fact, work together in a bipartisan way to fill these judicial vacancies. And I want to again welcome Justice Sykes and her family to the Committee, and I look forward to her taking the Federal bench in the Seventh Circuit.

Thank you, Mr. Chairman.

Chairman HATCH. Well, thank you, Senator. We appreciate that.

I would note for the record that Justice Sykes received more votes in Wisconsin than either Kerry or Dean did.

[Laughter.]

Chairman HATCH. I thought that was pretty good. But I appreciate this bipartisan approach towards your nomination.

We are always honored to have any meeting with the distinguished Chairman of the House Judiciary Committee, but to come

over all the way from the House to testify here today, we are grateful to have you here, and we will recognize you at this time.

PRESENTATION OF DIANE S. SYKES, NOMINEE TO BE CIRCUIT COURT JUDGE FOR THE SEVENTH CIRCUIT BY HON. F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Representative SENSENBRENNER. Thank you very much, Mr. Chairman. I will not repeat the biographical information that Senators Kohl and Feingold have given relative to the nomination of Justice Diane Sykes to the Seventh Circuit bench. Let me say that I probably have known Diane and known of her longer than either of my two Senate colleagues because her father, Jerry Schwerm, was the village manager in a community in my district as I was elected to the State legislature. Every once in a while he brought his teenage daughter along to some of the functions that we were at, and she has always struck me as someone who has a great deal of intellect, a good temperament, and unimpeachable integrity. And as she has progressed through law school and into private practice and then on to both the trial court bench and the State Supreme Court bench, she has certainly been able to develop and hone those skills and will be an outstanding representative as a judge on the Seventh Judicial Circuit. What the two Senators have not said is that the ABA has rated her well qualified for the position that she has been nominated to.

I would like to say a few words about the commission process as well. There is a tradition in Wisconsin that the commission is used to try to take as much of the politics out of judicial nominations as possible. And that will only work if the commission members themselves rise above politics and approve names for sending on to the White House that would be acceptable to whatever President is in office at the time. And I think that all 12 members of the commission—the two deans, the two State bar representatives, the members that Senators Kohl and Feingold have appointed to the Commission, as well as the four members that I have appointed to the commission—all took that charge very seriously. And the four names that were approved by the commission and sent to the White House all would have met the White House's political and ideological tests for approval by the White House, this White House, to be sent to the United States Senate.

I have talked with Justice Sykes as well, and I am convinced that she will impartially administer justice to all that come before the appeals court, as she has done on the appeals court on Wisconsin and as a trial judge in Milwaukee County. She obviously has got strong support by the voters. When she ran in the statewide election for her full 10-year term in April 2000, she won a contested election with 65.52 percent of the vote, and I think that is a tremendous endorsement of the people of Wisconsin in her judicial abilities.

So I would urge her speedy confirmation, and thank you for the time.

Chairman HATCH. Thank you, Mr. Chairman. We are delighted to have you here, and we know how busy you are, and we certainly

expect you to head back to the House. And that is certainly good praise for the nominee, and we are very grateful for that.

Now we will turn to Senator Murray. We are delighted to have you and Senator Cantwell here, and we appreciate your taking time out of your busy schedules to be here to testify. Senator Murray?

PRESENTATION OF JAMES L. ROBART, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON, BY HON. PATTY MURRAY, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator MURRAY. Thank you very much, Mr. Chairman and members of the Committee. I am honored to be here today to introduce Jim Robart to this Committee. For more than 30 years, he has been a respected and important part of the Seattle legal community. Senator Cantwell and I worked with President Bush to select him from a list of very qualified candidates, and today I am proud to offer my full support for his speedy confirmation.

I especially want to welcome his wife and friends. His wife, Mari Jalbing; his long-time friend, Doug Adkins; and Mr. Adkins' daughter, Blakeley, are all Washington State residents, and they are here with him today.

Jim and Mari have been foster parents to six children, and while they could not all join us in person today, I know they share the pride that so many in my State feel on Jim's nomination.

Mr. Chairman, I met with Jim Robart, and I am impressed by his professionalism, his decency, and his experience. After more than 30 years of distinguished legal service, he is ready to be confirmed as the next U.S. District Judge for the Western District of Washington State. And I can tell you that he has the strong support of a wide group of attorneys and community leaders throughout Washington State.

There are many things to say about Jim Robart. He earned an undergraduate degree at Whitman College, graduating magna cum laude, and he got his law degree at Georgetown University. He has 30-plus years of experience in private practice, and he is currently the managing partner at Lane, Powell, Spears, Lubersky, and is an expert in complex litigation. He was the lead counsel in a constitutional challenge on a Washington initiative that would have required all State residents to vote on all tax increases. The Washington State Supreme Court found the initiative unconstitutional. And he has also handled several other important cases in my home State, including many energy cases and disputes regarding intellectual property. He has received a unanimous well qualified rating by the American Bar Association.

Jim Robart also has a generous sense of community service through his work with at-risk and special needs youth. He has done extensive work with the Seattle Children's Home, which offers mental health services and special education for Seattle's most at-risk youth, and is associated with the Children's Home Society of Washington, which is renowned for providing parenting skills statewide to many troubled families. And, of course, I should mention that Jim and Mari's dedication is evident as foster parents to six children.

Those things are all important, but they only provide glimpses into a man whose professionalism, fairness, thoughtfulness, and compassion set a great example for many people in my State. Mr. Chairman, I am proud to be here today to introduce Jim Robart to this Committee, and I urge his speedy confirmation.

Thank you.

Chairman HATCH. Thank you, Senator Murray. We appreciate your taking the time to be here. It is great praise for this nominee, and we are grateful to you. And we know how busy you are. If you need to leave, we would be happy to excuse you.

Senator Cantwell, you are last but not least. I want you to know that.

PRESENTATION OF JAMES L. ROBART, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON, BY HON. MARIA CANTWELL, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman. I appreciate that. As a former member of the Committee, it is good to be back with my colleagues here.

Mr. Chairman, I join with my colleague Senator Murray in introducing this incredibly talented nominee for the vacancy of the District Court of the Western District of Washington, James Robart. And Senator Murray has already introduced his family who is here to support him as well.

In one sense, today's hearing is a homecoming for Mr. Robart. Early in his career, he served as an aide to former Senator Scoop Jackson and to Senator Mark Hatfield, so I am sure that they would both be very proud of his accomplishments during his long legal and productive career and that he is before this Committee for this nomination today.

Following his public service as a staff member in both Houses, Mr. Robart returned to Washington State—as Senator Murray said, is a second-generation native graduate of Whitman College and Georgetown Law School—where Mr. Robart has worked as an attorney for the past three decades. And during this time, as Senator Murray outlined, he has earned a reputation for fairness and integrity that is well known. That is why his evenhanded and thoroughness I think is very appropriate, the fact that we selected him by our bipartisan Committee and recommended him for this vacancy.

Members of the Washington State legal community and the White House and my colleagues have all worked together to review these nominees in a process that I think has worked well. I would add that this approach I think has helped produce a very high quality group of nominees, and I believe it should be a model for many other States in our country.

Together, we all agree that James Robart is the right person for this job and that the people of the Western District of Washington will be well served by his presence on the bench. I will not go over some of his legal accomplishments that Senator Murray articulated, but I think that his many years in the managing partner position and practice there at Lane Powell have served him well, and

you will be very impressed by this nominee's answering of questions today before this Committee. And I urge your support.

Thank you.

Chairman HATCH. Well, thank you, Senators. We appreciate both of you. For you to take time out to come here means a lot to us, but it also means a lot to the nominee, and we are grateful to you.

If we can have the three nominees come to the table, I am going to put all three of you up there even though sometimes we split them. But we will put you all up here and save a little bit of time here.

If you will all stand and just raise your right hands, do you swear that the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Justice SYKES. I do.

Mr. ROBART. I do.

Judge SANCHEZ. I do.

Chairman HATCH. Thank you. Well, we are delighted to have all three of you here. We are trying to do our best job on this Committee, and we are working hard to try and do a bipartisan job on this Committee and get as many judges on the bench as we can possibly get so that the people of this country are not bereft of justice. So we are grateful to have you all three here.

Now, what I would like to do is take a few moments and let you speak and say whatever you would care to. I would like you to introduce your families to us. We welcome all members of the respective families, and we will go from there.

So, Justice Sykes, we will begin with you.

STATEMENT OF DIANE S. SYKES, NOMINEE TO BE CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT

Justice SYKES. Thank you. And, Mr. Chairman, I thank you and the members of the Committee for the honor of this hearing, and I would like to thank the President for the honor of this nomination. I am very grateful to Senator Kohl and Senator Feingold for their generous support of my nomination and for their very kind words of introduction. I am also grateful to Congressman Sensenbrenner, Chairman Sensenbrenner, for his presence here today in support of my nomination and for his friendship.

I have no opening statement, but I would like to introduce the members of my family who are here with me today. My older son, Jay, is a freshman in high school, and he had two tests and a biology presentation. And so he—

Chairman HATCH. Well, that is not an excuse.

[Laughter.]

Chairman HATCH. That is as good an excuse as I can think of.

Justice SYKES. Well, I told him that if am fortunate enough to be confirmed that he is not getting out of the investiture. However, he did stay home to go to class. But my younger son, Alex, is here.

Chairman HATCH. Please stand.

Justice SYKES. He is in sixth grade, and he very generously agreed to skip school and come.

Chairman HATCH. He looks like he could pass just about anything.

Justice SYKES. I am very glad that he is here to participate in this important moment for our family.

Chairman HATCH. Good to have him here.

Justice SYKES. My father, Gerald Schwerm, and my stepmother, Judy Schwerm, are here as well.

Chairman HATCH. We are so grateful to have you here. We welcome you and you have to be very proud.

Justice SYKES. You have heard about his career in public service as well.

My sister, Kathryn Lynden, and her husband, Jim Lynden, are here. My stepbrother, David Stegeman, is here. I am very grateful for their support here with me today. And also my administrative assistant at the Wisconsin Supreme Court, Joyce Dohse, and her husband, Bob, are here in support of me as well.

Chairman HATCH. We welcome all of you. We are grateful to have you here. It does help to have friends here in the Judiciary Committee from time to time.

[Laughter.]

Justice SYKES. Thank you. I welcome your questions.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

   Diane S. Sykes, nee Diane Elizabeth Schwerm.

2. **Address: List current place of residence and office address(es).**

   Residence: Mequon, WI.

   Office: Wisconsin Supreme Court, State Capitol, Post Office Box 1688, Madison, WI 53701-1688.

3. **Date and place of birth.**

   December 23, 1957, Milwaukee, WI.

4. **Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

   Divorced.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

   Northwestern University, 1976-80, Bachelor of Science-Journalism, 1980.

   Marquette University Law School, 1981-84, Juris Doctor, 1984.

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

   The Milwaukee Journal, news reporter, 1980-81.

   VonBriesen & Redmond (now VonBriesen & Roper), law clerk, Summer, 1982.

   Friebert, Finerty & St. John, law clerk, Fall, 1982-1984.

   Honorable Terence T. Evans, United States District Court, Eastern District of Wisconsin, law clerk, 1984-85.

Whyte & Hirschboeck, S.C. (now Whyte Hirschboeck Dudek, S.C.), Associate Attorney, 1985-92.

Milwaukee County Circuit Court Judge, 1992-99.

Wisconsin Supreme Court Justice, 1999-present.

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

None.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Marquette Law Review, 1982-84.

9. **Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

State Bar of Wisconsin; Bench-Bar Committee, State Bar of Wisconsin; Milwaukee Bar Association; Association for Women Lawyers; Seventh Circuit Bar Association; Federalist Society, Milwaukee Lawyers' Chapter (Board of Advisors, 1996-present); Thomas E. Fairchild Inn, American Inns of Court; St. Thomas More Society; Criminal Penalties Study Committee; Wisconsin Judicial College (faculty member, 1997-2000); Wisconsin Trial Judges' Association; Milwaukee Trial Judges' Association.

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

St. James Catholic Church; Dismas Ministry (this is an archdiocesan ministry that distributes Bibles and serves the spiritual needs of prison inmates.) My church and this ministry do not lobby before public bodies. I also belong to the Parent-Teacher Association at Lake Shore Middle School, which does not lobby before public bodies.

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Wisconsin Supreme Court, 1984; United States District Court, Eastern and Western Districts of Wisconsin, 1984; United States Court of Appeals for the Seventh Circuit, 1984.

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Publications:

"In Memoriam, Howard B. Eisenberg," Marquette Law Review, Vol. 86, No. 2, pp. 325-27 (copy attached.)

"Don't 'Bury the Lede': What Jurists Can Learn From Journalists," Wisconsin Law Journal, October 17, 2001 (copy attached.)

"Ethics and Rhetoric in Wisconsin Judicial Elections," Wisconsin Interest, Vol. 9, No. 2, Summer 2000 (copy attached.)

"Judges Must Be Unbiased," Milwaukee Journal Sentinel candidates' forum, January 21, 2000 (copy attached.)

"A Behind-the-Gavel View of Trial Lawyers," Milwaukee Magazine, October, 1999 (copy attached.)

Speeches:

I have not given any speeches on constitutional law or legal policy.

"State Court Judicial Selection" (copy attached.) I have given this speech on a number of occasions: in 2003, at the Marquette University Law School Chapter of the Federalist Society, at the Northwestern University Law School Chapter of the Federalist Society, and at the Washington County Bar Association; in 2002, at the Institute for Justice student conference, and at the ABA 7th Circuit Student Division; and in 2001, at the Wisconsin Forum. This speech grew out of remarks delivered extemporaneously in a panel discussion at the Toledo Law School "Selection of State Judges Symposium" in 2001, see 22 U. Tol. L. Rev. 287 (Winter 2002), and out of my article, "Ethics and Rhetoric in Wisconsin Judicial Elections," listed above.

"Ethics and the Attorney Disciplinary System" (copy attached.) I have given this speech on a number of occasions: in 2002, at the Thomas E. Fairchild Inn of the American Inns of Court; and in 2001, at the State Bar of Wisconsin "Ethics for Government Lawyers" seminar, at the Civil Trial Lawyers of Wisconsin conference, and at the University of Wisconsin Law School Chapter of the Federalist Society.

"Teen Court Conference Keynote Address" (copy attached.) October 7, 1999.

I have given many speeches during the course of my judicial campaigns, in 1992 for Milwaukee County Circuit Court, and in 2000 for the Wisconsin Supreme Court. I have also spoken and taught at civic, legal and other events during the course of my judicial career. My campaign speeches typically related to my qualifications for judicial office and the role of the judiciary in our representative system of government; I often delivered these remarks extemporaneously. My speeches to civic groups have related to the judiciary and court system generally (e.g., the role and operation of the state supreme court; women in the judiciary; balancing a judicial career and a family.) I have been an instructor or team-teacher at a number of judicial and legal continuing education seminars, including the Wisconsin Judicial College, on topics of criminal law and procedure, sentencing law, and trial practice. I do not have copies or outlines of these speeches and lectures.

There have been news reports and editorials about my judicial campaign debates and appearances. It has not been my practice to keep copies of media reports on my campaign speeches.

13. Health: What is the present state of your health? List the date of your last physical examination.

I am in good health. My last physical examination was on October 2, 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Milwaukee County Circuit Court, elected to six-year term, 1992; re-elected, 1998. This is a state trial court of general jurisdiction.

Wisconsin Supreme Court, appointed to fill mid-term vacancy, 1999, elected to ten-year term, 2000. This is the state's highest court, with general jurisdiction over appeals by petition for review, bypass or certification from the intermediate court of appeals; original jurisdiction over certain matters; and administrative and supervisory jurisdiction over the lower courts and over court agencies.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

(1) Citations to the ten most significant opinions I have written (in reverse chronological order):

1. Mt. Horeb Community Alert v. Village Board of Mt. Horeb, 2003 WI 100 ___ Wis. 2d ___, 665 N.W.2d 229.

2. LeMere v. LeMere, 2003 WI 67, 262 Wis. 2d 426, 663 N.W.2d 789.

3. State v. Gordon, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765.

4. Digicorp v. Ameritech, 2003 WI 54, ___ Wis. 2d ___, 662 N.W.2d 652 (concurring in part, dissenting in part).

5. Stehlik v. Rhoads, 2002 WI 73, 253 Wis. 2d 477, 645 N.W.2d 889.

6. State v. Robins, 2002 WI 65, 253 Wis. 2d 298, 646 N.W.2d 287.

7. Jensen v. Elections Board, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537 (I wrote this *per curiam* opinion for a unanimous court).

8. Green v. Smith & Nephew AHP, Inc., 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727 (dissent).

9. R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781.

10. State v. Outagamie County, 2001 WI 78, 244 Wis. 2d 613, 628 N.W.2d 376 (plurality opinion).

(2) Citations to appellate opinions in which I was reversed as a trial judge:

The following are published reversals:

1) Nankin v. Shorewood, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 141. This case involved an equal protection challenge to a statute providing for a de novo trial in the

circuit court on property tax appeals in counties of less than 500,000. I upheld the statute in the circuit court. The Supreme Court reversed, concluding that the statute's distinction between counties with populations of more and less than 500,000 violated equal protection.

2) State v. Agnello, 226 Wis. 2d 164, 593 N.W.2d 427 (1999). This case involved the issue of the propriety of the prosecutor's questions pertaining to the truthfulness of several statements by the defendant during a Miranda-Goodchild hearing. As the circuit court judge presiding over the hearing, I had allowed certain questions, over objection, as bearing on the defendant's credibility as a witness. The Supreme Court reversed, concluding that questions pertaining to the truthfulness of a defendant's statements are never relevant or admissible in a Miranda-Goodchild hearing.

3) State v. Hampton, 201 Wis. 2d 661, 549 N.W.2d 756 (Ct. App. 1996). The court of appeals remanded this case for a hearing on the issue of a juror's inattentiveness. After the hearing, the defendant's conviction was affirmed in State v. Hampton, 217 Wis. 2d 614, 579 N.W.2d 260 (Ct. App. 1998).

4) State v. Johnson, 207 Wis. 2d 239, 558 N.W.2d 375 (1997). This case involved the issue of the requirement of asportation in an armed robbery. The defendant carjacked a motorist at gunpoint, but because the car either stalled or would not start, did not actually succeed in making off with the car. I had accepted the defendant's guilty plea to armed robbery. The Supreme Court reversed, finding the element of asportation missing.

5) State v. Santana-Lopez, 2000 WI App 122, 237 Wis. 2d 332, 613 N.W.2d 918. This case involved a sexual assault of a child, and, on the prosectutor's motion, I had excluded evidence that the defendant had offered to take a polygraph or a DNA test. The court of appeals reversed, concluding that the defendant's offer to take a DNA test was relevant and admissible.

6) State v. Thompson, 225 Wis. 2d 578, 593 N.W.2d 875 (Ct. App. 1999). This case involved the issue of sentence credit. I had disallowed credit on an adult court sentence for time the defendant spent in juvenile custody after having his juvenile supervision revoked. The court of appeals reversed, ordering credit for the juvenile custody against the adult sentence.

7) In re Commitment of Brown, 215 Wis. 2d 716, 573 N.W.2d 884 (Ct. App. 1997). This case involved the issue of the availability of judicial substitution in Chapter 980 sex predator cases. I had concluded that because the statute is silent on the issue, and specified its own fast-track procedural scheme, judicial substitution was unavailable. The court of appeals reversed, incorporating the civil judicial substitution statute into Chapter 980.

8) State v. Fritz, 212 Wis. 2d 284, 569 N.W.2d 48 (Ct. App. 1997). This case involved a claim of ineffective assistance of counsel stemming from trial counsel's suggestion that the defendant should commit perjury. I had concluded that the defendant's trial counsel was deficient but that any prejudice was of the defendant's own making, because he was responsible for his own perjured testimony. The court of appeals reversed, concluding that trial counsel was deficient and that his deficient performance was prejudicial.

9) State v. Kordas, 191 Wis. 2d 124, 528 N.W.2d 483 (Ct. App. 1995). This case involved a charge of attempted receiving stolen property stemming from a sting operation in which the police altered the VIN number of a Harley-Davidson motorcycle to make it appear as if it were stolen. The defendant bought the motorcycle believing it to be stolen, but because it was not actually stolen, was charged with attempted receiving stolen property. I dismissed the charge based upon legal impossibility, because the property in question was not stolen. The court of appeals reversed.

The following are unpublished reversals (copies attached):

1) Mews Companies, Inc. v. City of Milwaukee, 239 Wis. 2d 593, 620 N.W.2d 482 (Ct. App. 2000)(unpublished, nonprecedential per curiam opinion). This was a complex public construction contract case. I was reversed only on the issue of pretrial interest, and on all other issues was affirmed.

2) Lupinski v. City of Glendale Community Development Authority, 238 Wis. 2d 446, 617 N.W.2d 907 (Ct. App. 2000)(unpublished, nonprecedential per curiam opinion). This was a condemnation case under Chapter 32, and involved the interpretation of a settlement agreement between the property owner and the City. I had granted summary judgment in favor of the City. The court of appeals reversed, concluding that there were material facts in dispute requiring a trial.

3) State v. Darby, 230 Wis. 2d 745, 604 N.W.2d 33 (Ct. App. 1999)(unpublished, nonprecedential per curiam opinion). I had denied, without a hearing, the defendant's post-sentence motion to withdraw his no contest pleas to charges of fleeing an officer, possession of marijuana, and obstructing an officer. The court of appeals reversed for a hearing on the defendant's plea withdrawal motion.

4) State v. Barber, 224 Wis. 2d 936, 592 N.W.2d 318 (Ct. App. 1999)(unpublished, nonprecedential per curiam opinion). The defendant in this case was charged with two fingerprint burglaries, one involving the home of a Milwaukee police officer. I had excluded as irrelevant the defendant's testimony that the Milwaukee police had a vendetta against him because of his past work as a police informant. The court of appeals reversed, concluding that the defendant's theory about a police vendetta was relevant.

5) State v. Matthew, 202 Wis. 2d 650, 551 N.W.2d 64 (Ct. App. 1996)(unpublished, nonprecedential opinion). I had denied, without a hearing, the defendant's post-sentence motion to withdraw his Alford plea. The court of appeals reversed for a hearing on the motion.

6) State v. Robertson, 185 Wis. 2d 920, 520 N.W.2d 292 (Ct. App. 1994)(unpublished, nonprecedential opinion). The court of appeals reversed and remanded for resentencing on this misdemeanor case involving a charge of entry into locked building. The court agreed with the defendant's contention that I had improperly "lumped together," for purposes of sentencing, this defendant with his co-defendants, who had been convicted of more serious misdemeanors arising out of the same episode.

(3) Citations to significant opinions I have written on federal or state constitutional law (in reverse chronological order):

1. State v. Church, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141.

2. State v. Knapp, 2003 WI 121, ___ Wis. 2d ___, 666 N.W.2d 881 (concurring in part, dissenting in part).

3. Trinity Evangelical Lutheran Church and School v. Tower Ins., 2003 WI 46, 261 Wis. 2d 333, 661 N.W.2d 789 (dissent).

4. In re Termination of Parental Rights to Thomas J.R., 2003 WI 61, 262 Wis. 2d 217, 663 N.W.2d 734 (dissent).

5. In re John Doe Proceeding, 2003 WI 30, 260 Wis. 2d 653, 660 N.W.2d 260 (dissent).

6. State v. Tucker, 2003 WI 12, 259 Wis. 2d 484, 557 N.W.2d 374 (dissent).

7. State ex rel. Tate v. Schwarz, 2002 WI 127, 257 Wis. 2d 40, 654 N.W.2d 438.

8. In re Commitment of Dennis H., 2002 WI 104, 255 Wis. 2d 359, 647 N.W.2d 851.

9. State v. Williams, 2002 WI 94, 255 Wis. 2d 1, 646 N.W.2d 834.

10. State v. Harvey, 2002 WI 93, 254 Wis. 2d 442, 647 N.W.2d 189.

11. State v. St. George, 2002 WI 50, 252 Wis. 2d 499, 643 N.W.2d 777 (concurrence).

12. State v. Jennings, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142.

13. State v. Oakley, 2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200 (dissent).

14. State v. Henderson, 2001 WI 97, 245 Wis. 2d 345, 629 N.W.2d 613.

15. State v. Peters, 2001 WI 74, 244 Wis. 2d 470, 628 N.W.2d 797.

16. State v. Johnson, 2001 WI 52, 243 Wis. 2d 365, 627 N.W.2d 455,

17. State v. Matejka, 2001 WI 5, 241 Wis. 2d 52, 621 N.W.2d 891.

18. State v. Derango, 2000 WI 89, 236 Wis. 2d 721, 613 N.W.2d 833.

19. Vincent v. Voight, 2000 WI 93, 236 Wis. 2d 588, 614 N.W.2d 388 (concurring in part, dissenting in part).

20. State v. Richter, 2000 WI 58, 235 Wis. 2d 524, 612 N.W.2d 29.

21. State v. McGill, 2000 WI 38, 234 Wis. 2d 560, 609 N.W.2d 795.

22. State v. Hughes, 2000 WI 24, 233 Wis. 2d 280, 607 N.W.2d 621.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None (other than judicial offices).

17. **Legal Career:**

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I served as a law clerk to the Honorable Terence T. Evans, United States District Court, Eastern District of Wisconsin, 1984-85. Judge Evans was elevated to the Seventh Circuit Court of Appeals by President Clinton.

2. whether you practiced alone, and if so, the addresses and dates;

Not applicable.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

1985-92, Whyte & Hirschboeck, S.C. (now Whyte Hirschboeck Dudek, S.C.), 111 E. Wisconsin Avenue, Milwaukee, WI 53202. I was an associate attorney in the litigation department.

In 1992, I was elected to the Milwaukee County Circuit Court, and have served in the judiciary continuously since that time, having been appointed in 1999 and elected in 2000 to the Wisconsin Supreme Court.

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

I was an associate attorney in the litigation department at Whyte & Hirschboeck, S.C. for seven years. My practice generally involved working with partners on civil litigation matters in state and federal court.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

I worked primarily on civil litigation matters involving the firm's business clients. I also accepted *pro bono* assignments from the United States District Court for the

Eastern District of Wisconsin through the Civil *Pro Bono* Project. These clients were prison inmates with federal civil rights claims relating to conditions of confinement.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

2. What percentage of these appearances was in:
(a) federal courts;
(b) state courts of record;
(c) other courts.

3. What percentage of your litigation was:
(a) civil;
(b) criminal.

Nearly all of my cases in private practice settled before trial. I appeared in federal court only occasionally, although I often litigated dispositive motions in federal district court and assisted on a few appeals. I argued one case in the Seventh Circuit Court of Appeals. Approximately 60 percent of my cases were in federal court. I appeared in state court occasionally. Approximately 40 percent of my cases were in state court. I did not appear in other courts. My litigation private practice was entirely in civil court.

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Nearly all my cases in private practice settled prior to trial. My practice was characterized predominantly by pleading, discovery and motion practice, followed by settlement if motions were unsuccessful in resolving the case. I tried one jury trial solo, one jury trial as second chair, and one court trial solo. [I gained most of my trial experience as a Milwaukee County Circuit Court Judge. In my seven years on the trial court bench, I handled through disposition approximately 4,000 misdemeanor cases, 2,500 felony cases, and 650 large claims civil cases, and presided over approximately 200 jury trials.]

5. What percentage of these trials (in private practice) was:
(a) jury: two-thirds
(b) non-jury: one-third

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

As I have noted, my private practice was characterized predominantly by pleading, discovery and motion practice; almost all cases settled prior to trial. I usually worked on litigation matters with one or more partners at the firm, although I would occasionally have sole responsibility for cases. I did not retain any files or other case materials when I left private practice for the Milwaukee County Circuit Court bench in 1992, and therefore cannot reconstruct my private practice to provide specific, detailed information about cases on which I worked. I recall that some cases involved large sums of money; however, while each case was obviously important to the client, I do not recall any that would be considered legally significant, with the exception of: 1) Bembenek v. Bablitch, a federal civil rights case challenging the overcrowded conditions at Wisconsin's women's prison, which I handled solo and on a *pro bono* assignment from the federal court; and 2) Fleet Wholesale Supply Co., Inc. v.

Remington Arms, Co., Inc., a Wisconsin Fair Dealership appeal that I argued in the Seventh Circuit Court of Appeals.

1) Bembenek v. Bablitch, United States District Court, Eastern District of Wisconsin, Case No. 86-C-262, before the Honorable John Reynolds, 1986-92.

I had sole responsibility for this class action civil rights lawsuit, which alleged unconstitutional conditions of confinement at the Taycheedah Correctional Institution, Wisconsin's women's prison. The case involved extensive discovery, retention and preparation of expert witnesses on both sides, and the negotiation of a consent decree redressing the overcrowded conditions at the prison and providing for enhanced medical, clinical and rehabilitative services at the prison. Opposing counsel: Gerald Nichol, now a judge on the Dane County Circuit Court, City-County Building, 210 Martin Luther King, Jr., Blvd., Madison, WI 53703-3344, (608) 266-4009; and Frank Remington, now in the Wisconsin Department of Justice, 17 W. Main St., P.O. Box 7857, Madison, WI 53707-7857, (608) 266-3542.

2) Fleet Wholesale Supply Co., Inc. v. Remington Arms Co., Inc., 846 F.2d 1095 (7th Cir. 1988).

This was an action under the Wisconsin Fair Dealership Law. I argued the appeal in 1988, before the Seventh Circuit Court of Appeals, the Honorable Frank Easterbrook, the Honorable Walter Cummings, and the Honorable Richard Cudahy. Opposing counsel: Michael A. Bowen, Foley & Lardner, 777 E. Wisconsin Avenue, Milwaukee, WI 53202-5300, (414) 297-5538.

3) Sampson Investments v. Jondex Corp., 176 Wis. 2d 55, 499 N.W.2d 177 (1993). This case involved the interpretation of a commercial lease and also the question of whether a tortious interference with contract claim is actionable where there is no breach of contract. I was elected to the bench and left private practice before this case was heard in the Wisconsin Supreme Court, but assisted with pleadings, discovery, research and briefing in the lower courts. Opposing counsel: James O. Huber ((414) 297-5523) and David M. Lucey ((414) 297-5511) of Foley & Lardner; John Busch of Michael, Best & Friedrich, (414) 271-6560.

4) Gordie Boucher Lincoln Mercury v. Selig Chevrolet, et al., 162 Wis. 2d 63, 471 N.W.2d 317 (Ct. App. 1991)(unpublished, non-precedential opinion). This was a breach of contract action stemming from a commercial real estate transaction. I assisted with pleadings, discovery, research and briefing. Opposing counsel: Jeffrey Aiken (formerly of the Frisch, Dudek law firm which later merged with Whyte Hirschboeck to form Whyte Hirschboeck Dudek), (414) 274-3931; and James R. Clark, Foley & Lardner, (414) 297-5543.

5) Market Street Associates Ltd. Partnership v. Dale Frey, et al., 21 F. 3d 782 (7th Cir. 1994), 941 F.2d 588 (7th Cir. 1991). This was a breach of contract action

stemming from a commercial real estate transaction. I was elected to the bench before the case was concluded, but assisted with pleadings, discovery, research and briefing in the early stages of the case. Opposing counsel: William Alverson and Michael Apfeld, Godfrey & Kahn, (414) 273-3500; and Jane Schlicht, Cook & Franke, (414) 227-1291.

6) Vinegar antitrust litigation. My law firm represented a Wisconsin-based vinegar company in an investigation relating to allegations of price fixing in the vinegar industry. I assisted with some research and a large-scale document production, but was elected to the bench and left the firm before any substantive developments in the matter.

7) Thomas Roskos, et al. v. New Berlin Memorial Hospital, et al., Waukesha County Circuit Court Case No. 88-CV-2988. This was a breach of contract actions involving physicians whose hospital practice privileges were termination. I second-chaired the jury trial. Opposing counsel: William McCarty, McCarty & Lenz, (414) 273-2011.

8) Cedarburg Dairy v. Cloverleaf Farms Distributors, Inc., Ozaukee County Circuit Court Case No. 91-CV-339. This was a large commercial breach of contract case. I assisted with pleadings, discovery and research in the early stages of the case.

9) Home Care Medical Supplies v. HME, Milwaukee County Circuit Court (no case number available). This was a trademark action between two home medical supply companies. I assisted with pleadings, discovery, research and briefing. Opposing counsel: Jeffrey S. Hynes, Jeffrey S. Hynes & Associates,(414) 225-2920.

10) Northpoint Medical Group v. Calimlim et al., Milwaukee County Circuit Court (no case number available). This was a dispute over a non-compete covenant between a medical clinic and several doctors formerly associated with the clinic. I assisted with pleadings, discovery, research and briefing.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

My private practice was concentrated in civil litigation, as described above.

My service on the Milwaukee County Circuit Court bench was as follows: August, 1992-December, 1993, misdemeanor division; December, 1993-August, 1998, felony division; August-1998-August 1999, large claims civil division.

I have been a member of the Wisconsin Supreme Court since September, 1999.

In addition to my private practice and service on the bench, I have participated in the following legal activities:

Wisconsin Judicial College Faculty. I was on the faculty for four years, teaching criminal law and procedure to state court judges required to attend as part of their continuing judicial education requirements.

Criminal Penalties Study Committee. I was a member of this legislatively-established committee, which was charged with the responsibility of reclassifying the state criminal code, developing sentencing guidelines for use by trial court judges, and making additional recommendations for statutory changes in connection with the state's implementation of truth-in-sentencing. After the committee's work was completed, I was also a member of an instructional team that presented seminars on truth-in-sentencing to judges and lawyers around the state.

State Bar of Wisconsin, Bench-Bar Committee. I was recently appointed to a three-year term.

"Challenges & Possibilities." This is a restorative justice rehabilitative program at the Green Bay Correctional Institution. I teach a session on sentencing law approximately four times each year.

Fox Point Board of Zoning Appeals. Prior to my election to the bench in 1992, I was a member of the zoning appeals board in the Milwaukee suburb where I resided. In this capacity, I heard and decided requests for variances and special exceptions from the village zoning code.

Thomas E. Fairchild Inn, American Inns of Court. As a judicial member, I work with a master and/or barrister member of the Inn to lead a pupilage group of younger lawyers in the development of an educational program for presentation to the Inn once a year.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   I have a deferred compensation account with the Wisconsin Deferred Compensation Program for state employees. I also have a retirement account with the Wisconsin Department of Employee Trust Funds.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

Conflicts of interest in the state judiciary are governed by statute and by the judicial code of ethics, which generally require recusal when there is a familial relationship or previous association with a party or matter (such as having represented the party as counsel on the matter or having handled the matter previously as a judge), or where there is a significant financial or personal stake in the matter. Also, if a judge determines that he or she cannot be impartial on a particular case, or it appears that he or she cannot be impartial, the judge is required to recuse. I have applied these rules and recused myself from participation in a number of cases as a trial court judge and supreme court justice. The most frequent reason for recusal has been that I previously handled the case as the trial court judge, although I have on occasion recused myself on cases in which my personal relationship with a party litigant would create an appearance of partiality. I will follow all applicable rules governing conflict of interest in the federal court, and do not anticipate any categories of potential conflict of interest.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   No.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria,**

and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See financial disclosure report.

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

See attached.

6. **Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

No (other than my own campaigns for the Milwaukee County Circuit Court and the Wisconsin Supreme Court).

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks: $12,000				Notes payable to banks-secured: $15,917.56			
U.S. Government securities-add schedule: $21,596.14				Notes payable to banks-unsecured			
Listed securities-add schedule: $62,358.40				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others: $2,465.35			
Accounts and notes receivable:				Accounts and bills due			
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule: $258,255.50 (Washington Mutual Home Loans)			
Real estate owned-add schedule: $303,000 (residence)				Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property: $9,460				Aggregate credit cards: $11,000			
Cash value-life insurance: $1,850							
Other assets itemize:							
State retirement (WI Dept. of Employee Trust Funds)(separation value): $71,282.59							

				Total liabilities: $287,638.41			
				Net Worth: $193,908.72			
Total Assets: $481,547.13				Total liabilities and net worth: $481,547.13			
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor None.				Are any assets pledged? (Add schedule) No.			
On leases or contracts None.				Are you defendant in any suits or legal actions? No.			
Legal Claims None.				Have you ever taken bankruptcy? No.			
Provision for Federal Income Tax None.							
Other special debt None.							

SCHEDULES FOR NET WORTH STATEMENT

DIANE S. SYKES

U.S. Government Securities

U.S. Debt Index Fund (held in WI Def. Comp. Program account): $18,003.46

AllianceBernstein US Government A (held in IRA): $3,592.68

Total: $21,596.14

Listed Securities:

Midcap Equity Index Fund (held in WI Def. Comp. Program account): $16,772.51

T Rowe Price Mid Cap Gr (held in WI Def. Comp. Program account): $17,341.53

Fid Contrafund (held in WI Def. Comp. Program account): $16,029.09

Janus Fund (held in WI Def. Comp. Program account): $12,215.27

Total: $62,358.40

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Sykes, Diane S	U. S. Court of Appeals 7th Cir	
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Circuit Judge, Nominee	5. ReportType (check appropriate type) (•) Nomination, Date ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/2002 to 10/31/2003
7. Chambers or Office Address P.O. Box 1688 State Capitol 16E Madison, WI 53701	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☑ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.		

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	2003	WI Deferred Compensation Program, limited control over account (choice of 18 specified investment options)
2.	2003	WI Department of Employee Trust Funds (retirement account), no control

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2001	State of Wisconsin, Judicial Salary (gross)	$105,675.32
2.	2002	Trust dividend, Raymond A. Mayer Trust	$612
3.	2002	State of Wisconsin, Judicial Salary (gross)	$107,487.32

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Sykes, Diane S	

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ **NONE** - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
4.	2003	State of Wisconsin, Judicial Salary (gross)	$105,675.32

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Sykes, Diane S	

IV. REIMBURSEMENTS – transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ **NONE** - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt.	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ **NONE** - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt.		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☑ **NONE** - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.			

FINANCIAL DISCLOSURE REPORT
Page 1 of 1

Name of Person Reporting	Date of Report
Sykes, Diane S	

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1. Midcap Equity Index Fund (via WI Def. Comp. Program)	B	Mkt.G/L, Int	K	T	Exempt.				
2. T Rowe Price Mid Cap Gr (via WI Def. Comp. Program)	C	Mkt.G/L, Int	K	T	Exempt.				
3. Fid Contrafund (via WI Def. Comp. Program)	B	Mkt.G/L, Int	K	T	Exempt.				
4. Janus Fund (via WI Def. Comp. Fund)	B	Mkt.G/L, Int	J	T	Exempt.				
5. US Debt Index Fund	A	Interest	K	T	Exempt.				
6. AllianceBerstein US Gov A	A	Interest	J	T	Exempt.				
7. Northwestern Mutual, cash value life insurance	B	Dividend	J	T	Exempt.				
8. Raymond A. Mayer Admin Trust	E	Distribution	J	T	Exempt.				
9. WI Department of Employee Trust Funds, retirement account		None	L	T	Exempt.				
10. Interest, Ozaukee Bank	B	Interest	J	T	Exempt.				
11. Interest, Bank One	A	Interest	J	T	Exempt.				

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Sykes, Diane S	Date of Report

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting Sykes, Diane S	Date of Report

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Diane S. Sykes Date 11/14/03

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

1) In private practice, I accepted *pro bono* assignments from the United States District Court for the Eastern District of Wisconsin through the Civil *Pro Bono* Project. These were civil rights conditions-of-confinement claims filed by prison inmates. The most significant of these cases was Bembenek v. Bablitch, a class action lawsuit challenging the overcrowded conditions at the Taycheedah Correctional Institution, Wisconsin's women's prison. United States District Court Judge John Reynolds appointed me shortly after the lawsuit was filed, and I represented the plaintiff class solo over the course of several years, through extensive discovery and retention and preparation of expert witnesses on both sides. The case was resolved by a negotiated consent decree by which the state agreed to various improvements in the conditions at the prison.

2) My *pro bono* service necessarily changed after I was elected to the bench. I served on the Criminal Penalties Study Committee (CPSC), which was charged with the responsibility of reclassifying the state's criminal code and creating sentencing guidelines for use by judges in the state's transition to truth-in-sentencing. Most of the CPSC's recommendations were adopted by the state legislature. I taught truth-in-sentencing frequently, at seminars for lawyers, judges, and correctional staff. I have also served on the faculty of the Wisconsin Judicial College, teaching criminal law and procedure to judges attending as part of their continuing judicial education requirements. I discontinued teaching at the Judicial College after my election to the Wisconsin Supreme Court. However, I still occasionally teach criminal law and ethics topics at seminars sponsored by the State Bar and other lawyers' organizations around the state. I am a judicial member of the Thomas E. Fairchild Inn of the American Inns of Court. I also teach three or four times a year in the "Challenges and Possibilities" program at the Green Bay Correctional Institution, a restorative justice/rehabilitative program for inmates at the prison. In addition, I have just been appointed to a term on the State Bar's Bench-Bar Committee.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in**

any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

No.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).**

Yes. The Wisconsin Federal Nominating Commission is a bipartisan commission that screens candidates for the federal judiciary and for United States Attorney. It has recommended my nomination. The Commission accepted and reviewed applications for the Seventh Circuit vacancy, interviewed the applicants, and recommended a slate of four finalists, of which I am one. Senators Kohl and Feingold interviewed each of the finalists, and have expressed their support for all four.

In addition to the Nominating Commission process, I have been interviewed by the White House Counsel, the Department of Justice, and the Federal Bureau of Investigation.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No, neither the White House Counsel's Office nor the Department of Justice has asked me any such question.

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The role of the judiciary is adjudicative only. Judges are not constitutionally empowered or institutionally equipped to develop or implement solutions to broad societal problems. As a Wisconsin Supreme Court justice and Milwaukee County Circuit Court judge, I have adhered to a philosophy of judicial restraint, respect for separation of powers and federalism, and I would continue to do so if confirmed as a judge on the United States Court of Appeals for the Seventh Circuit.

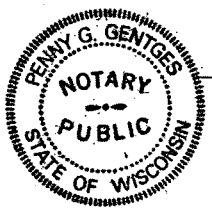
The role of a federal appellate judge is to interpret and apply congressional enactments and federal constitutional law according to United States Supreme Court and circuit precedents, and to apply state statutory and common law in diversity cases according to applicable state precedents. The federal judicial role is limited by the Article III "case or controversy" principle, which requires a particularized, concrete, judicially cognizable controversy capable of complete resolution, and is subject to requirements of standing, ripeness, and other considerations of justiciability that operate as limitations on federal judicial power. The principle of stare decisis also promotes judicial restraint, and, correspondingly, stability in and respect for the rule of law.

AFFIDAVIT

I, Diane S. Sykes, do swear that the information provided in this statement is, to the best of my knowledge, true and accurate.

11/20/03
(DATE)

Diane S. Sykes
(NAME)



Penny G. Gentges
(NOTARY)

Chairman HATCH. Thank you.
Mr. Robart, we will turn to you.

STATEMENT OF JAMES L. ROBART, NOMINEE TO BE DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WASHINGTON

Mr. ROBART. Mr. Chairman, thank you very much. I greatly appreciate the opportunity to have my hearing today. I am very thankful for Senators Murray and Cantwell for taking time to come. I know that's a special honor, and I very much appreciate it.

Joining me today is my spouse, Mari Jalbing.

Chairman HATCH. So delighted to have you here. Thank you for coming.

Mr. ROBART. Our daughter, Blakeley Adkins.

Chairman HATCH. Good to have you with us.

Mr. ROBART. And my long-time friend, Douglas Adkins.

Chairman HATCH. Douglas, happy to have you here.

Mr. ROBART. Thank you very much, Senator.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

James Louis Robart

2. Address: List current place of residence and office address(es).

Office: Lane Powell Spears Lubersky LLP
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338

Residence: Seattle, Washington

3. Date and place of birth.

September, 2, 1947, Seattle, Washington.

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married to Mari Charlott Jalbing. She is not employed outside the home.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Whitman College, September, 1965 - May, 1969
B.A. Degree - May, 1969

Georgetown University Law Center, August, 1970 - May, 1973
J.D. Degree - May, 1973

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

September, 1973 - present, Lane Powell Spears Lubersky LLP f/k/a Lane Powell Moss & Miller

September, 1971 - May, 1973, Congressman John Dellenback

May, 1970 - August, 1971, Senator Mark Hatfield

May, 1969 - March, 1970, Chevron Shipping Company

Board Positions

Seattle Children's Home	
Trustee	1977 - 1984
President	1981 - 1983
Children's Home Society of Washington	
Trustee	1991 - 1997
State Advisory Board	1997 - Present
Co-Chair, Second Century Committee	2002- Present
Whitman College	
Board of Overseers	1988 - 2000
Chair, Board of Overseers	1998 - 2000
Trustee	2000 - Present
Hugh S. Cannon Foundation	
Trustee	1996 - Present

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Phi Beta Kappa
Whitman College B.A., magna cum laude with honors in major study 1965
Administrative Editor, *Georgetown University Law Review*
Fellow, American College of Trial Lawyers

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Washington State Bar Association 1973 - present
Alaska State Bar Association 1985 - present
American Bar Association 1973 - present
Federal Bar Association (W.D. of WA) 1986 - present
King County Bar Association 1973 - present
Organizing Committee, Federal Circuit Bar Association 1983 - 1984
Board of Governors, Federal Circuit Bar Association 1985 - 1986
Lawyer Representative, Ninth Circuit Judicial Conference 1993 - 1995
Ninth Circuit Advisory Board 2002 - present
Civil Justice Reform Act Advisory Group (W.D. of WA) 2003-present

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to any organizations that lobby before public bodies.

Other Organizations:

National Audubon Society and Seattle Chapter
Children's Home Society of Washington
Friends of the Volunteer Park Conservatory

Trustee, Hugh S. Cannon Foundation
Phi Beta Kappa
Puget Sound Maritime Historical Society
Seattle Children's Home
Seattle Yacht Club
Washington Athletic Club
Trustee, Whitman College

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Washington State, October 18, 1973
Western District of Washington, November 9, 1973
United States Supreme Court, December 6, 1976
Ninth Circuit Court of Appeals, February 10, 1978
Eastern District of Washington, July 6, 1981
Federal Circuit Court of Appeals, March 1, 1985
Alaska State, December 2, 1985
District of Alaska, December 4, 1985

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Guest Editorial, "Standing Up To Flawed I-695 Is Act of Courage"
Puget Sound Business Journal, May 1, 2000 (Attached)

I have not given any speeches on constitutional law or legal policy. Over the years I have spoken at seminars and continuing legal education programs. These include "Recent Developments In the Law of Collateral Estoppel and Res Judicata", Federal Bar Association of Western Washington CLE

(November 19, 1982)(attached); panelist with Judges William Schwarzer, A. Wallace Tashima and John Coughenour at "Federal & Civil Procedure Before Trial CLE" sponsored by the Rutter Group for Washington attorneys (date in the early 1990's)(no written materials); and "Directors and Officers Liability" to the Professional Liability Underwriting Society in Seattle, Washington (February 13, 1997)(no written materials). I also served as co-author of the Administrative Law Chapter of the *Washington Lawyer Practice Manual* published by the Young Lawyers Section of the Seattle-King County Bar Association in 1976. (no copy available).

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. November 5, 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

None

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Not applicable

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the

terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

None

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Did not clerk

2. whether you practiced alone, and if so, the addresses and dates;

Never in solo practice

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Dates	Firm	Address	Position
January, 2003 - Present	Lane Powell Spears Lubersky LLP	1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338	Managing Partner
January 1998 - December 2002	Lane Powell Spears Lubersky LLP	1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338	Co-Managing Partner
June, 1990 - December, 1997	Lane Powell Spears Lubersky LLP	1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338	Partner
June, 1989 - May, 1990	Lane Powell Moss & Miller	1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338	Partner
January, 1980 - May, 1989	Lane Powell Moss & Miller	1301 Fifth Avenue, Suite 3800 Seattle, WA, 98101	Partner

October, 1977 - December, 1979	Lane Powell Moss & Miller	1301 Fifth Avenue, Suite 3800 Seattle, WA, 98101	Associate
September, 1973- September, 1977	Lane Powell Moss & Miller	1700 Washington Building Seattle, WA 98101	Associate

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

1998 - 2003, Complex commercial litigation but reduced caseload due to firm management responsibilities.

1980 - 1997, Commercial litigation with emphasis on complex matters including class actions, securities and employment law.
1976 - 1980, Primary emphasis on all types of litigation

1973 - 1976, Associate attorney doing various assignments in business and litigation

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Primarily represented officers, directors and companies in complex commercial matters with an emphasis on securities litigation.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Have appeared in court regularly. Frequency has decreased as the size and complexity of matters has increased.

2. What percentage of these appearances was in:
(a) federal courts; 45%

(b) state courts of record; 40%
(c) other courts; 0%
(d) arbitrations 15%

3. What percentage of your litigation was:
(a) civil; 100%
(b) criminal. 0%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Have tried in excess of 50 cases to verdict or judgment as sole counsel or lead counsel.

5. What percentage of these trials was:
(a) jury; 40%
(b) non-jury. 60%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. **March Point Cogeneration Company v. Puget Sound Energy**,

Summary: Plaintiff March Point Cogeneration Company

built a cogeneration facility at an oil refinery based on two 20-year electrical output contracts with a local utility. Under the structure of the contracts, the utility took the market risk for electrical prices and March Point took the market risk for natural gas prices. Natural gas was one part of the plant's fuel supply.

The wholesale price for electricity went below the assumptions used by the utility in its decision to enter into the output contracts. The utility began to complain about aspects of the formation and performance of the contracts alleging that the contracts should be declared void.

March Point filed suit seeking a declaratory judgment that the contracts were valid and enforceable. The utility counter-claimed seeking to have the contracts declared null and void and counter-claiming for damages.

Client: March Point Cogeneration Company
Participation: Lead counsel
Final Disposition: Jury verdict for client which was affirmed by the Ninth Circuit
Dates: November, 1995 - June, 2000
Court: United States District Court for the Western District of Washington
Chief Judge Barbara Jacobs-Rothstein
Cause No. 95-01823)
Ninth Circuit Court of Appeals, Memorandum Opinion by Judges Trott, Kleinfeld and Silverman [232 P.3d 895 (2000)]

Co-Counsel: Randall P. Beighle, Esq.
Lane Powell Spears Lubersky LLP
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
(206) 223-7096

Opposing Counsel: James P. Savitt, Esq.
1305 Fourth Avenue, Suite 414
Seattle, WA 98101
Telephone: (206) 749-0500

2. **General Brewing v. Olympia Brewing Company, et al.**

Summary: Plaintiff General Brewing Company sued Olympia Brewing Company, and several other Northwest brewing companies, alleging that they had secured large volume accounts, such as sports facilities or public arenas, by making illegal payments for preferential treatment.

General alleged antitrust and commercial tort causes of action. The defendants alleged that General's style of operation and quality of product were the reasons for its poor sales.

The case was litigated during the pendency of a Special Committee of Olympia Board of Directors which was investigating allegations of the Company's payment of illegal gratuities.

Client: Olympia Brewing Company
Participation: Lead counsel
Final Disposition: Claim against Olympia was settled after successful motion for summary judgment on statute of limitations.
Dates: December, 1977 - March, 1981
Court: United States District Court for the Western District of Washington
Judge Jack Tanner (consolidated
Cause Nos. C77-286T, C77-292T and C78-91T)

Co-Counsel: Nick S. Verwolf, Esq.
Davis Wright Tremaine LLP
10500 NE 8th Street, Suite 1800

Bellevue, WA 98004-4300
Tel: (425) 646-6100
Counsel for Carling Brewing Company

Barnes H. Ellis, Esq.
Stoel Rives LLP
Standard Insurance Center

900 Fifth Avenue, Suite 2300
Portland, OR 97204-1268
Tel: (503) 220-2480
Counsel for Blitz-Weinhard Brewing Company

Opposing Counsel: Albert Malanca, Esq.
Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim
2200 First Interstate Plaza
P. O. Box 1157
Tacoma, WA 98401-1157
Telephone: (253) 572-5050

3. **Eichenholtz v. Intermec Corporation, et al.**

Summary: In 1991, a wholly owned subsidiary of Litton Industries made a tender offer for Intermec Corporation, a major manufacturer in the bar code industry. The tender offer price resented a premium to Intermec's current market price.

A class action securities claim was filed seeking to enjoin the acquisition. Plaintiffs claimed the tender offer price was inadequate and that the tender materials were false and misleading. After intensive discovery a preliminary injunction hearing was held and the District Court declined to grant a preliminary injunction enjoining the acquisition. The tender offer went forward and after shareholder approval the acquisition was completed.

The case then continued as a damages claim alleging that the tender offer materials were inadequate, misleading and contained material omissions.

Client: Litton Industries, Inc.
Participation: Co-lead counsel
Final Disposition: Motion for preliminary injunction enjoining the acquisition was denied following a hearing. Subsequent damage claim was dismissed following a mediated settlement.
Dates: April, 1991 - December, 1993
Court: United States District Court for the Western

District of Washington
Judge William Dwyer (Cause No. CV-00585-WLD)

Co-Counsel:

James Irwin, Esq.
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900

Seattle, WA 98104-1158
Tel: (206) 623-7580
Counsel for Intermec Corporation

Steven F. Goldstone, Esq.
Davis Polk Wardell
450 Lexington Avenue
New York, NY 10017
Tel: (212) 450 - 4000
Counsel for Litton Industries

Opposing Counsel:

Steve W. Berman, Esq.
Hagens & Berman
1301 Fifth Avenue, Suite 2929
Seattle, WA 98101
Telephone: (206) 623-7292

4. **Ridge Development v. APP and Chevron,**

Summary: Plaintiff Ridge Development built a service station in Yelm, Washington. It entered into a Dealer Supply Agreement with local wholesaler Associated Petroleum Products to operate a Chevron branded retail outlet.

The station was unsuccessful due to increased competition from rival service stations and other high volume, low price gasoline outlets.

In its suit Ridge alleged that it had a direct contractual relationship with Chevron and that it had claims against Chevron based on the Washington Franchise Investment Protection Act and the Washington Gasoline Dealers Bill of Rights Act. It alleged that

Chevron's system of wholesaler-served retail outlets was a franchise and that Chevron had sold unregistered franchises in Washington.

Client: Chevron USA, Inc.
Participation: Lead counsel
Final Disposition: Jury verdict in favor of Chevron
Dates: August, 2003 - present
Court: Thurston County Superior Court, State of Washington; Cause No. 02-2-01314-4
Judge William McPhee

Co-Counsel:

David Jurca, Esq.
Helsell Fetterman LLP
P.O. Box 21846
1001 Fourth Avenue Plaza, Ste. 4200
Seattle, WA 98111-3846
Tel: (206) 292-1144
Co-Counsel for Chevron

J. Richard Creatura, Esq.
Gordon, Thomas, Honeywell
P.O. Box 1157
Tacoma, WA 98401
Tel: (206) 447-9505
Counsel for APP

Opposing Counsel:

Randall S. Thiel, Esq.
Chism Thiel McCafferty & Campbell
2001 Western Avenue, Suite 430
Seattle, WA 98121
Tel: (206) 728-0260

5. **Amalgamated Transit Union Local 587, et al. v. State of Washington**

Summary: In the Fall, 1999 Initiative I-695 was passed by the Washington voters. It required voter approval for all tax and fee increases by a government entity and repealed the Washington State Motor Vehicle Excise Tax.

Three Washington cities, along with a public employees

union, a port district and a municipal utility sued to have I-695 declared unconstitutional under the Washington State Constitution. The Washington Constitution contains a prohibition against a legislative enactment (including an initiative) from dealing with more than one subject.

Initiative I-695 was defended by the Washington Attorney General's Office and the committee that sponsored the initiative. Numerous groups intervened to file amicus briefs.

Client: Cities of Bainbridge Island, Bremerton and Lakewood. WA
Participation: Lead counsel in Superior Court and Washington Supreme Court.
Final Disposition: Superior Court decision in favor of finding Initiative - 695 unconstitutional was upheld by State Supreme Court.
Dates: November, 1999 - November, 2000
Court: King County Superior Court
Cause No. 99-2-27054-1 SEA and
Washington Supreme Court Cause No. 69433-8
(142 Wash.2d 183, 11 P.3d 762)
Judge Robert Alsdorf, King County Superior Court
Justice Barbara Madsen, Washington Supreme Court

Co-Counsel:

Michael Subit, Esq.
Frank Freed Subit & Thomas LLP
705 Second Avenue, Suite 1200
Seattle, WA 98104-1729
Tel: (206) 682-6711
Counsel for Transit Union

Paul J. Lawrence, Esq.
Preston Gates & Ellis LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
Tel: (206) 623-7580
Counsel for Port of Whitman County

Hugh D. Spitzer, Esq.

Foster Pepper & Shefelman
1111 Third Avenue, Suite 3400
Seattle, WA 98101
Tel: (206) 447-8965
Counsel for Tacoma Water

Opposing Counsel: Richard M. Stephens, Esq.
Groen Stephens & Klinge LLP
2101 112th Avenue N.E., Suite 110
Bellevue, WA 98004-2944
Tel: (425) 453-6206
Counsel for $30 license Tab
Initiative Campaign

Jeffrey D. Goltz, Esq.
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0128
Tel: (360) 753-2578
Counsel for the State of Washington

6. **Blanton v. Texaco**

Summary: Plaintiff Jerry Blanton operated several Texaco outlets including a service station/convenience store location. Under the Texaco arrangement, Texaco retained title to the gasoline but the convenience store clerk collected for the sale of the gasoline.

Mr. Blanton alleged that the station/convenience store arrangement was a franchise under Washington law. Washington law provides that there are three elements to a franchise: 1.) a common marketing plan; 2.) authorized use of a trademark or tradename; and 3.) payment of a franchise fee. Texaco defended alleging that the station/convenience store arrangement lacked a common marketing plan and a franchise fee.

Client: Texaco
Participation: Lead counsel
Final Disposition: Trial court decision in favor of client was upheld by Ninth Circuit.

Dates: May, 1988 - September, 1990
Court: United States District Court for the Western District of Washington and Ninth Circuit Judge Carolyn Dimmick Cause No. CV-00632 CRD)
Ninth Circuit Court of Appeals
Judge Brunetti [914 P.2d 188 (1990)]

Co-Counsel: Randall P. Beighle, Esq.
Lane Powell Spears Lubersky LLP
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
Tel: (206) 223-7096

Opposing Counsel: Robert H. Alsdorf, Esq.
Currently Judge Robert Alsdorf
King County Superior Court
E-863 King County Courthouse
Seattle, WA 98104-2386
Tel: (206) 296-9203

7. **Federal Deposit Insurance Corporation v. Prudential Bache Securities**

Summary: Defendant Prudential Bache Securities was responsible for hedging the loan portfolio of a large Idaho savings and loan. During a period of rapid market fluctuations, the hedge position went "under water" and the bank was taken over and liquidated by the Federal Deposit Insurance Corporation.

The FDIC sued Prudential Bache claiming that the hedge transactions were improper and that Prudential Bache's conduct violated various federal securities laws and business tort theories. The litigation took place against the background of the late 1980's savings and loan collapse.

Prudential Bache defended alleging that its hedging advice was sound and that the bank's refusal to take a loss, by closing the hedge transaction, was the real course of the bank's failure. The bank was under regulatory supervision and lacked the resources to absorb a financial loss.

Client: Prudential Bache Securities
Participation: Co-lead counsel
Final Disposition: Case settled in mediation before Judge M. Hogan (USDC of OR) following completion of discovery.
Dates: June, 1990 - September, 1992
Court: United States District for the Western District of Washington
Judge William L. Dwyer
Cause No. CV-00923- WLD)

Co-Lead Counsel: George L. Kirklin, Esq.
Lane Powell Spears Lubersky
601 Second Avenue, Suite 2100
Portland, OR 97204-3185
Tel: (503) 778-2118

Opposing Counsel: Marc Bowman, Esq.
Perkins Coie LLP
1201 Third Avenue, 40th Floor
Seattle, WA 98101-3099
Tel: (206) 359-8000
Ronald M. Gould, Esq.
Currently Judge Ronald M. Gould
Ninth Circuit Court of Appeals
Park Place Building, 21st Floor
1200 Sixth Avenue
Seattle, WA 98101
Tel: (206) 553-7344

8. **In Re Nordstrom Securities Litigation**

Summary: In late 1989 the Washington Department of Labor & Industries conducted an investigation into Nordstrom's compliance with state wage and hour regulations. At issue was alleged "off the clock" work by employees performing customer service related activities. The Department issued a report finding Nordstrom not in compliance with Washington State wage and hour laws and regulations.

Shortly thereafter, the United Food & Commercial

Workers Union commenced a class action on behalf of current and former Nordstrom employees to recover compensation for "off the clock" work. The class exceeded 100,000 members. The result of these developments was a decline in the price of Nordstrom stock.

Following the decline, a class action securities claim was filed alleging violation of federal and state securities laws. Nordstrom defended based on allegations that the price decline in its stock was normal for retailers during the period in question.

Client: Nordstrom, Inc.
Participation: Lead counsel
Final Disposition: Case settled following mediation after close of discovery.
Dates: February, 1990 - November, 1992
Court: United States District Court for the Western District of Washington
Chief Judge John C. Coughenour
Cause No. CV-00295 - JCC)

Opposing Counsel: Steve W. Berman, Esq.
Hagens & Berman
1301 Fifth Avenue, Suite 2929
Seattle, WA 98101
Telephone: (206) 623-7292

9. **Texaco v. Barry Davis**

Summary: Defendant Davis operated a Texaco service station under a Lessee Dealer Agreement. Pursuant to the Agreement, Mr. Davis was to operate the station at certain specified hours.

After entering into the Agreement, God appeared to Mr. Davis and instructed him to observe the "traditional Sabbath" and close the station from sundown Friday to sundown Saturday. Despite efforts to arrive at a mutually agreeable solution, Mr. Davis began to unilaterally close the station in breach of his Agreement.

Texaco sued to enforce the terms of the Agreement or to have Mr. Davis declared in breach of his obligations to operate the station. Mr. Davis defended on grounds that his constitutionally protected right of religious freedom required Texaco to allow him to follow his views on the proper Sabbath despite his contractual obligations to operate the station.

Client: Texaco
Participation: Lead counsel
Final Disposition: Ninth Circuit affirmed trial court's judgment in favor of Texaco.
Dates: April, 1993 - December, 1994
Court: United States District Court for Oregon Judge Helen Frye (Cause No. 93-CV-481) [835 F.Supp 1223 (1993)]
Ninth Circuit Court of Appeals Memorandum Opinion by Judges Fletcher, D.W. Nelson and Rymer [45 P.3d 437 (1994)]

Co-Counsel:
Robert E. Maloney, Jr., Esq.
Lane Powell Spears Lubersky LLP
601 SW Second Avenue, Suite 2100
Portland, OR 97204-3158
Tel: (503) 778-2100

Opposing Counsel:
David S. Shannon, Esq.
Shannon, Johnson & Bailey P.C.
575 Lloyd Center Tower
825 N.E. Multnomah St.
Portland, OR 97232-2154
Tel: (503) 232-3171

10. Ray, et al. v. Atlantic Richfield Company and Seatrain

Summary: In 1976 the Washington Legislature passed an act requiring that all oil tankers over a certain size entering Puget Sound have "double hulls". This requirement, and other provisions of the act, were designed to reduce the chances of a major oil spill in Puget Sound.

The Atlantic Richfield Company and Seatrain (operators of American flagged non-double hull oil tankers) sued alleging that Washington's requirements were a violation of the Commerce Clause of the U.S. Constitution. They argued that states were not free to set design and operation standards for oil tankers which operated in the waters of various states.

Client: Seatrain Lines, Inc.
Participation: Responsible for the research and preparation of Seatrain's pleadings. Handled all aspects of discovery.
Disposition: United States Supreme Court reversed three judge District Court which voided statute in its entirety.
Dates: September, 1976 - March, 1978
Court: United States Supreme Court, Justice White [435 U.S. 151 (1978)]
United States District Court for the Western District of Washington
Three judge panel (Cause No. 75-648 M)

Co-Counsel:

Richard Sherwood, Esq.
O'Melveney & Meyers
400 South Hope Street, 15th Floor
Los Angeles, CA 90071-2899
Tel: (213) 430-6483
Counsel for Atlantic Richfield

Raymond W. Haman, Esq.
Lane Powell Spears Lubersky LLP
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338
Tel: (206) 223-7000

Opposing Counsel:

Charles Roe, Esq.
Senior Assistant Attorney General
State of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
Tel: (360) 664-0988

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Counseling clients in the area of antitrust compliance, employment law, intellectual property, trade secrets and securities.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Lane Powell Spears Lubersky LLP 401(k) Plan. I intend to "rollover" my retirement plan into an individual IRA if confirmed as a judge. I will also have my law firm capital account returned to me upon my withdrawal from the Firm.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

There is the potential of an appearance of conflict of interest involving cases or clients connected with my current law firm and companies in which I hold a financial position. To resolve the former, I intend to recuse myself from cases involving my current law firm or its clients until a sufficient period of time has elapsed that there is not an appearance of a conflict of interest. For certain colleagues from private practice, both connected with my current employer or otherwise, I will decline to hear cases they are involved in due to continuing friendships or acquaintances.

As to conflicts of interest created by financial matters, it is my intention to simplify my financial affairs to the maximum extent possible. I intend to prepare a list of companies in which I own an interest and make it available so there are multiple opportunities for screening potential conflicts. I will not hear cases involving companies in which I hold an ownership position.

In addition, I will abide by the Code of Judicial Conduct.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See Ethics in Government Act of 1978 Financial Disclosure Report attached hereto.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached Financial Net Worth Statement

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

No

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT
NOMINATION REPORT

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. App. §§101-111)

1. Person Reporting (Last name, first, middle initial)	2. Court or Organization	3. Date of Report
ROBART, JAMES L.	U.S. District Court Western District of Washington	December 10, 2003
4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time) District Court Judge (nominee)	**5. Report Type (check appropriate type)** _X_ Nomination, Date: 12/09/2003 ___ Initial ___ Annual ___ Final	**6. Reporting Period** January 1, 2002 – December 9, 2003
7. Chambers or Office Address Lane Powell Spears Lubersky LLP 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2338	**8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.** Reviewing Officer _____ Date _____	

[redacted]

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

☐ NONE (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1	Managing Partner	Lane Powell Spears Lubersky LLP
2	Trustee	Whitman College
3	Trustee	Hugh S. Cannon Foundation

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

☐ NONE (No reportable agreements.)

	DATE	PARTIES AND TERMS
1	2002 & 2003	Lane Powell Spears Lubersky LLP 401(k) Plan
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

☐ NONE (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1	2001	Lane Powell Spears Lubersky LLP	$425,575.00
2	2002	Lane Powell Spears Lubersky LLP	$414,085.00
3	(01/01 to 12/09) 2003	Lane Powell Spears Lubersky LLP	$418,537.45
4	2002	NASD Regulation, Inc.	$800.00
5	(01/01 to 12/09) 2003	NASD Regulation, Inc.	$1,750.00
6.	(CONTINUED IN PART VIII)		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

IV. REIMBURSEMENTS. – transportation, lodging, food, entertainment
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	**NONE** (No such reportable reimbursements.)	
1	EXEMPT	
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
☐	**NONE** (No such reportable gifts.)		
1	EXEMPT		$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those to spouse and dependent children; see pp. 32-33 of Instructions.).*

	CREDITOR	DESCRIPTION	VALUE CODE*
☐	**NONE** (No such reportable liabilities.)		
1	Bank of America	Credit Card	J
2	American Express	Credit Card	J
3	Bank of America	Credit Card	J

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VII. Page 1 INVESTMENTS and TRUSTS – income, value, transactions *(includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

[redacted]

NONE (No reportable income, assets,									
1 KeyBank	A	Int.	K	T					
2 Bank of America	A	Int.	E	T					
3 Brokerage Account # 1	A	Int.	L	T					
4 LPSL WA –1	D	Int.	L	T					
5 Capstan Fund LP	A	Passive Income	J	D					
6 Oak Harbor, WA Rental Property (2002 - $388,903)	C	Rent	N	S					
7 Shoreline, WA Rental Property (2002 - $346,000)	D	Rent	N	S					
8 Seattle, WA Rental Property # 1 (2002 - $169,000)	D	Rent	M	S					
9 ISROB Associates	D	Passive Inc. & Int.	J	D					
10 Bank of Washington Common Stock		None	K	T					
11 Charter Bank Common Stock		None	L	T					
12 Pallino Restaurant Common Stock		None	K	T					
13 Barclay Seed Co. Common Stock		None	K	W					
14 Brokerage Account # 2	D	Div. & Int.	P1	T					
-- Boeing Common Stock	A	Div.	K	T					
-- Boise Cascade Common Stock	A	Div.	K	T					

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VII. Page 2 INVESTMENTS and TRUSTS – income, value, transactions *(includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

[redacted]

☐ **NONE** (No reportable income, assets,									
Continued from page 1									
-- Deutsche Telekom Common Stock	B	Div.	J	T					
-- ICOS Common Stock		None	K	T					
-- JDS Uniphase Common Stock		None	J	T					
-- Starbucks Common Stock		None	O	T					
-- Wells Fargo Common Stock	B	Div.	K	T					
-- Western Wireless Common Stock		None	L	T					
16 Treasury Direct Account	D	Int.	M	T					
-- 03/31/03 Note	A	Int.	J	T					
-- 05/31//03 Note	B	Int.	K	T					
-- 03/31/04 Note	B	Int.	F	T					
-- 05/15/07 Note	B	Int.	E	T					
17 ChevronTexaco Common Stock	B	Div.	L	T					
18 Brokerage Account #3	B	Div & Int.	L	T					
-- Albertson's Common Stock	A	Div.	K	T					
-- Costco Common Stock		None	J	T					
-- First Mutual Bank Common Stock	A	Div.	K	T					
19 Brokerage Account #4	A	Div. & Int.	K	T					
-- Principal Financial Common Stock	A	Div.	K	T					

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VII. Page 3 INVESTMENTS and TRUSTS – income, value, transactions *(includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

[redacted]

☐ NONE (No reportable income, assets,									
Continued from page 2									
– Stancorp Financial Common Stock	A	Div.	K	T					
Janus Balanced Mutual Fund	D	Div.	M	T					
Columbia Balanced Mutual Fund	D	Div.	M	T					
EB Equity Index Mutual Fund	C	Div.	N	T					
Janus Worldwide Mutual Fund	D	Div.	M	T					
T.R. Price Eur. St. Mutual Fund	B	Div.	M	T					
Vanguard GNMA Mutual Fund	B	Div.	M	T					
Vanguard Int. Growth Mutual Fund	C	Div.	G	T					
20 Brokerage Account # 5	A	Int.	D	T					
– PG&E Common Stock		None	D	T					
21 Brokerage IRA # 1	E	Int. & Div.	P1	T					
– Kraft Common Stock	A	Div.	D	T					
– Microsoft Common Stock		None	M	T					
– Starbucks Common Stock		None	N	T					
– Int. Bank Zero Coup Notes		None	M	T					

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VII. Page 4 INVESTMENTS and TRUSTS – income, value, transactions *(includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

[redacted]

☐ NONE (No reportable income, assets,									
Continued from page 3									
-- Chemical Bank Zero Coup Note		None	J	T					
-- Pepsico Zero Coup Notes		None	M	T					
-- Chattanooga Corp Zero Coup Note		None	M	T					
-- Int Flavors Zero Coup Note		None	K	T					
-- Ford Zero Corp Notes		None	L	T					
-- Household Fin Zero Corp Note		Note	K	T					
-- Gov't Back Trust Notes		None	K	T					
-- Gov't Secs. Trust Notes		None	J	T					
-- U.S. Treasury Strips		None	M	T					
-- Tenn. Valley Auth. Note		None	K	T					
-- Fed Nat Mort Assn. Strips		None	L	T					
-- Gov't Trust Certif.		None	K	T					
-- Resolution Trust Strips		None	M	T					
-- New Jersey Pension Note		None	L	T					
-- MBNA Bank C.D.		None	M	T					
-- First USA Bank C.D.		None	K	T					
-- Capital One Bank C.D.		None	K	T					

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VII. Page 5 INVESTMENTS and TRUSTS – income, value, transactions *(includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

[redacted]

☐ NONE (No reportable income, assets,									
Continued from page 4									
– Providian Bank C.D.		None	L	T					
– Bank Hapoalim C.D.		None	L	T					
– Discover Bank C.D.		None	L	T					
22 Brokerage IRA # 2	A	Div. & Int.	L	T					
– U.S. Treasury Strips		None	E	T					
– Am. Century Ultra Mut. Fund	A	Div.	J	T					
– Janus Balanced Mut. Fund	A	Div.	J	T					
– T.R. Price New Asia Mut. Fund	A	Div.	J	T					
23 Brokerage IRA # 3	A	Div. & Int.	L	T					
– U.S. Treasury Strips		None	K	T					
– Am. Century Ultra Mut. Fund	A	Div	J	T					
– Janus Balanced Mutual Fund	A	Div	J	T					
– T.R. Price New Asia Mut. Fund	A	Div.	J	T					
24 Brokerage IRA # 4	B	Int. & Div.	M	T					
– Keycorp Common Stock	A	Div.	J	T					
– Microsoft Common Stock		None	L	T					

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VII. Page 6 INVESTMENTS and TRUSTS – income, value, transactions *(includes those of spouse and dependent children. See pp. 34-57 of instructions.)*

[redacted]

☐ NONE (No reportable income, assets,									
Continued from Page 5 – 3M Common Stock	A	Div	J	T					
– WA Mutual Common Stock	A	Div.	K	T					
– Int. Bank for Recon. Note		None	J	T					
– GMAC Bond	B	Int.	K	T					
25 Brokerage Account # 6	E	Int.	N	T					
– Sparks, NV Rev. Bonds	A	Int.	K	T					
– Hawaii G.O. Bond	A	Int.	K	T					
– Intermountain Power Bond	A	Int..	J	T					
– Sedona Sewer Bond	A	Int.	J.	T					
– Seattle Municipal Light Bond	A	Int.	J	T					
– Pierce County Housing Bond	A	Int.	K	T					
– Unita, WY School Bond	A	Int.	J	T					
– Crook County School Bond	A	Int.	J	T					
– North Slope G.O.	A	Int.	J	T					
– WA Public Power Sup Bond		None	K	T					
– Cleveland OH Power Bond	B	Int.	K	T					
– Sparks NV Redev. Agy Bond	A	Int.	K	T					
– Clark City NV Trans. Bond	B	Int.	K	T					

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VII. Page 7 INVESTMENTS and TRUSTS – income, value, transactions *(includes those of spouse and dependent children. See pp. 34-37 of Instructions.)*

[redacted]

☐ NONE (No reportable income, assets,									
Continued from page 6									
-- Twin Falls, ID Dev. Bond	B	Int.	K	T					
-- Arapahoe, CO Cap Bond		None	J	T					
-- Pierce County School Dist Bond		None	J	T					
-- Spokane, WA G.O. Bond	B	Int.	K	T					
-- Oregon St. G.O. Bond	A	Int.	J	T					
-- Yakima, WA School Dist. Bond	A	Int.	J	T					
-- Tacoma, WA Public Util Bond	A	Int.	J	T					
-- Utah Building Own. Bond	A	Int.	J	T					
-- Washington State Bond	B	Int.	K	T					
-- Bensalem, PA Wtr Bonds		None	J	T					
-- Spokane, WA School Bonds	A	Int.	K	T					
-- Maricopa, AZ Dev. Auth. Bond	A	Int.	J	T					
-- Spokane, WA G.O. Bond	A	Int.	J	T					
26 Hugh Cannon Foundation	M	Div. & Int.	P1	T					
-- Boeing Common Stock	B	Div.	L	T					
-- Exxon Mobil Comm Stock	D	Div.	M	T					
-- Fannie Mae Comm Stock	D	Div.	M	T					
-- Fed Home Loan Comm Stock	D	Div.	M	T					

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VII. Page 8 INVESTMENTS and TRUSTS – income, value, transactions *(includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

[redacted]

☐ NONE (No reportable income, assets,									
Continued from page 7									
– Ford Comm Stock	C	Div.	M	T					
– G.E. Comm Stock	D	Div	M	T					
– I.B.M. Comm Stock	B	Div	N	T					
– Merck Comm Stock	D	Div.	M	T					
– Pfizer Comm Stock	C	Div	M	T					
– Safeco Comm Stock	C	Div	M	T					
– Verizon Comm	D	Div.	M	T					
– WA Mutual Bank Comm Stock	E	Div	P1	T					
– 3M Comm Stock	B	Div	M	T					

[redacted]

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	JAMES L. ROBART	December 10, 2003

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report).

Part III. (continued)

6. LaVassar Florists $_____

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature James L Robart Date December 10, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILLFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App, § 104.)

[redacted]

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		403	160	Notes payable to banks-secured			00
U.S. Government securities-add schedule		200	000	Notes payable to banks-unsecured			00
Listed securities-add schedule	2	054	834	Notes payable to relatives			00
Unlisted securities--add schedule		163	279	Notes payable to others			00
Accounts and notes receivable:			00	Accounts and bills due			00
Due from relatives and friends			00	Unpaid income tax			00
Due from others			00	Other unpaid income and interest			00
Doubtful			00	Real estate mortgages payable-add schedule			00
Real estate owned-add schedule	1	913	703	Chattel mortgages and other liens payable			00
Real estate mortgages receivable			00	Other debts-itemize:			00
Autos and other personal property		250	000				
Cash value-life insurance			00				
Other assets itemize:							
Municipal Bond Account		363	301				
Smith Barney IRAs	2	295	916				
Charles Schwab IRAs		105	979	Total liabilities		00	00
Attached Schedule		833	715	Net Worth	8	583	887
Total Assets	8	583	887	Total liabilities and net worth	8	583	887
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			00	Are any assets pledged? (Add schedule) No			
On leases or contracts			00	Are you defendant in any suits or legal actions? No			
Legal Claims			00	Have you ever taken bankruptcy? No			
Provision for Federal Income Tax			00				
Other special debt			00				

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

The State of Washington Rules of Professional Conduct provide:

> Pro Bono Publico Service
>
> A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service and activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

During my career, I have attempted to discharge my responsibility to render public interest legal service in all three ways.

I represented no-fee clients through Lane Powell's arrangement with Evergreen Legal Services. This involved being a intake lawyer at a legal services office and often resulted in six to seven matters which I subsequently handled. As part of this program, I conducted trials on behalf of no-fee clients in the State of Washington Superior Court and District Justice Court systems. In addition, I have represented no-fee clients independent of the Legal Services program with an emphasis on representation of Southeast Asian refugees in various matters.

I have actively participated in activities intended to improve the law, the legal system or the legal profession. These include service as a speaker at seminars and continuing legal education programs as well as serving as a co-author of the Administrative Law Chapter of the *Washington Lawyer Practice Manual* published by the Young Lawyers Section of the Seattle-King County Bar Association. In addition, I have served on the Organizing Committee for the Federal Circuit Bar Association; a trustee of the Federal Circuit Bar Association; a Lawyer Representative to the Ninth Circuit Judicial Conference; and as a member of the Ninth Circuit Advisory Board. I am currently a member of the Civil Justice Reform Act Advisory Board for the Western District of Washington.

Finally, my wife and I support the Annual Legal Aid for Washington Fund and the King County Bar Foundation which support programs providing legal services to low-income Washington residents.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

Currently belong to no such organizations. In 1965 I joined the Whitman College chapter of Sigma Chi Fraternity. I was unaware of Sigma Chi's restrictive membership policy at that time. The Whitman chapter withdrew from Sigma Chi and established a local fraternity in 1968-69 in protest of the policy.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process,

from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Through various announcements, including a letter from the Federal Bar Association for the Western District of Washington, I became aware of an opening on the District Court bench. I submitted my application to the six-member Bipartisan Judicial Selection Committee and was selected for an interview. After my interview with the Committee, I was advised by the co-chairs that I was one of three names being submitted for consideration.

Subsequently, I was interviewed by the Office of the White House Counsel in Washington, D.C. Subsequent to this interview, I interviewed with Senators Patty Murray and Maria Cantwell in Seattle. Subsequently, I was advised of my selection as the nominee for a newly available position.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The authority of the Federal Judiciary is specified in the Constitution and the laws of the United States. The Federal Judiciary must honor the separation of powers among the executive, legislative and judicial branches of government even when motivated by honorable goals and exercising prudent judgment. To do otherwise will cause our citizens to lose confidence in the judicial system.

District Court judges must subordinate their personal views to the democratic choices made by the legislative and executive branches. The role of the District Court judge is to follow the law established by the Constitution, statutes or case precedence and not unwisely expand the power of the judiciary beyond the limits established by law. The expansion of power by any branch of government hinders the ability of other branches to govern and, ultimately, weakens the exercise of powers lawfully delegated to the Federal Judiciary.

Chairman HATCH. Well, thank you.
Judge Sanchez, we will turn to you.

STATEMENT OF JUAN R. SANCHEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Judge SANCHEZ. Thank you, Chairman Hatch. I do not have any prepared remarks, but I would like to take the opportunity to thank you and thank Senator Leahy for the invitation to appear before the Senate Judiciary Committee. And I would like to take this opportunity to thank Senator Specter and Senator Santorum for their kind words and the support they have given me throughout this process, and also to the President for the tremendous honor he has bestowed upon me, my family, my friends, and my colleagues and the Chester County community.

I have some guests here that have traveled from Chester County to support me this afternoon, and it is with tremendous honor that I introduce some of my friends and some are the best lawyers in Chester County: former Justice of the Supreme Court of Pennsylvania, William H. Lamb, who is in the back.

Chairman HATCH. Happy to have you here, Mr. Justice.

Judge SANCHEZ. My mentor and good friend, Mr. James McErlane, a senior partner with the law firm of Lamb and McErlane, who is in the back.

Chairman HATCH. Grateful to have you here, Mr. McErlane.

Judge SANCHEZ. My staunch supporter and good friend, Skip Brion, who is the Chairman of the Chester County Republican Party.

I have with me the honor of introducing my friend and colleague, Paula Francesco Ott, who was the first woman to be elected as a trial judge in Chester County.

Chairman HATCH. We are honored to have you here.

Judge SANCHEZ. We have our President Judge Howard F. Riley. I have the honor also of having with me a good friend, Hon. William Mann.

Chairman HATCH. We are happy to have both you judges here. Just great.

Judge SANCHEZ. Damaris Acevedo, my fiancee.

Chairman HATCH. Happy to have you here.

Judge SANCHEZ. And some special guests that have traveled from Chester County: John Stanzione, Debbie and Steven Long, and Peter Hart.

Chairman HATCH. Happy to have you all here.

Well, thank you so much. This is great.

Judge SANCHEZ. Thank you.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name: (include any former names used).

Juan Ramon Sanchez

2. Address: List current place of residence and office address(es).

Residence:
West Chester, PA

Office of the Honorable Juan R. Sanchez
Court of Common Pleas
15th Judicial District PA Courts
Chester County Courthouse
2 North High Street, Ste 230
West Chester, PA 19380-0991

3. Date and place of birth:

December 22, 1955
Vega Baja, Puerto Rico

4. Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Divorced.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

City College of the City University of New York, 1974-1978, Bachelor of Arts, Political Science (1978) (Cum Laude, Dean's list)

University of Pennsylvania Law School, 1978-1981, Juris Doctor (1981)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you

were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Judge, Court of Common Pleas, 15th Judicial District of Pennsylvania 1998-Present
West Chester, PA

Villanova University School of Law 2003 (Fall)
Villanova, PA
Adjunct Professor

Immaculata University 2003 (Spring)
Immaculata, PA
Adjunct Professor

West Chester University 2003 (Spring)
West Chester, PA
Adjunct Professor

MacElree, Harvey, Gallagher, Featherman & Sebastian 1997
West Chester, PA
Trial Attorney

Chester County Public Defender's Office 1983-1997
West Chester, PA
Senior Trial Attorney

Sole Practitioner 1990-1997
West Chester, PA
General Legal Practice

Nester, Nester & Sanchez 1983-1990
West Chester, PA
General Legal Practice

Legal Aid of Chester County 1981-1983
West Chester, PA
Staff Attorney

Camden Regional Legal Services, Inc. 1981
Philadelphia, PA
Law Clerk

Camden Regional Legal Services, Inc. 1979
Bridgeton, NJ
Law Clerk

Aspira of New York, Inc. 1977-1978
New York, NY
Associate Program Director

Aspira Bronx Center 1974-1975
Bronx, NY
Youth Counselor/Instructor

Community Volunteers in Medicine
Board Member (December 2002 to December 2005)

The Volunteer English Program in Chester County
Board Member (1998-present)

Housing Authority of the County of Chester
Appointed to five-year term by the Chester County Commissioners to serve as Commissioner for the Housing Authority (July 1992)

Corporate Board of Directors of the YMCA of Central Chester County/YMCA at the Brandywine Valley
Board Member and Chairman of the Public Policy Committee

Chester County Hospital
Board Member (1997)
Board Member and Chairman of the Public Policy Committee

Riverside Care of Chester County
Advisory Board Member (1992 - 1997)

United Way of Chester County
Advisor Strategic Planning Committee (1999)

Centro Guayacan (formerly Casa Nueva Vida, Inc.)
A multi-cultural educational community center - Chairman, Board of Directors (1981-1983)

7. Military Service: **Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

None.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Benjamin R. Jones Award (given to the graduating student who has demonstrated concern for humanity and law by outstanding contribution to the public interest through legal and law school affiliated activities). 1981

Awarded seven (7) merit scholarships which assisted in financing my legal and undergraduate education (1974-1978):

Council on Legal Educational Opportunities Scholarship;
Samuel and Esther Shapiro Scholarship;
Felix Cohen Award;
United Federation of Teachers Scholarship;
Study Abroad Scholarship;
Edwin Gould Scholarship; and
Judge William B. Jones Memorial Scholarship Award

Pennsylvania Conference of State Trial Judges President's Award 2002-2003

Honored for outstanding contribution in organizing the 2002 Meet The Judges Program in Chester County; increased community participation from 60 to 950 attendees.

Governor's Advisory Commission on Latino Affairs Pride Award

Honored for outstanding contribution to Pennsylvania's Latino community in Criminal Justice and Human Rights, March 2001.

La Communidad Hispana

Distinguished Community Service Award, 1999.

Department of Veterans Affairs Hospital

Recognized for leadership in developing affordable housing and efforts in providing legal services to those with limited financial resources.

Chester County Bar Association's 1993 and 1997 Judicial Poll

Found qualified for the position of Judge of the Chester County Court of Common Pleas.

Honorable John E. Stively, Jr., American Inn of Court's Executive Committee

Recognized and promoted to Master in 1996.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are

or have been a member and give the titles and dates of any offices which you have held in such groups.

American Judges Association

Pennsylvania Bar Association

Chester County Bar Association

Honorable John E. Stively, Jr., American Inn of Court

The J. Willard O'Brien American Inn of Court in Villanova, Pennsylvania
Master

Pennsylvania Association of Criminal Defense Lawyers
Past Member

National Association of Housing & Redevelopment Officials
Past Individual Member

Pennsylvania Supreme Court
Appointed 2003 by Supreme Court of Pennsylvania Chief Justice Ralph J. Cappy to the Racial Ethnic Bias Implementation Committee of the Judicial Council.

Pennsylvania Supreme Court
Appointed 2000 Committee on Racial and Gender Bias in the Justice System.

Pennsylvania Conference of State Trial Judges Judicial Ethics Committee
Appointed 1998 to fill a vacancy created by Judge Marjorie Lawrence's retirement for a period of three (3) years. Reappointed 2001 for a second term to the Ethics Committee.

Chester County Criminal Justice Advisory Board (2002 - present)
Appointed 2002 to serve on the Chester County Criminal Justice Advisory Board and JNET Subcommittee by President Judge Howard F. Riley, Jr. Assisted in the implementation of the Central Regional Booking Video Arraignment Pilot Project.

Meet Your Judges Program
Appointed 1998 by President Judge Howard F. Riley, Jr. to increase public's understanding of the judiciary's role in resolving disputes between citizens. Public attendance increased from 60 people in 1998 to over 900 people in 2002 under my leadership.

Coordinator, Chester County Business Litigation Mediation/Arbitration Program
Encouraged and assisted both the Chester County Bar Association Business Section and the Chester County Chamber of Commerce in developing a business to business

Mediation/Arbitration Program. Program administration rests with the Chester County Chamber of Commerce.

Liaison between the Common Pleas Court and District Justices of Chester County (2000-2002)
Appointed by President Judge Howard F. Riley, Jr. Initiated and coordinated annual Continuing Legal Education Seminars for the Minor Judiciary. In the last two years, I coordinated two CLE seminars entitled: (1) "Preliminary Arraignment and Bail" (2001); and (2) "Recurring Evidentiary Problems at Preliminary Hearings" (2002).

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

I do not belong to any organization actively lobbying public institutions.

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

Chester County Court of Common Pleas	May 27, 1982
Supreme Court of Pennsylvania	July 1, 1982
United States District Court Eastern District of Pennsylvania	July 10, 1986

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

Speeches

How to Become a Judge, Villanova University School of Law; Latin American Law Students Association (LALSA); *October 9, 2003 and September 18, 2002*

If You Don't Stand for Something . . . You Will Fall for Anything, West Chester University, Eleventh Annual Latino Student Conference; *March 29, 2003*

Breaking the Cycle on Drugs, Alcohol Abuse, and Violence, Governor's Advisory Commission on Latino Affairs; *April 21, 2001*

13. **Health: What is the present state of your health? List the date of your last physical examination.**

Excellent health. Last physical examination was July, 2003.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

I serve as a trial judge in the Chester County Court of Common Pleas of the 15th Judicial District of the Pennsylvania Unified Court System. I was elected to join the Chester County Judiciary in November 1997 and was sworn on January 2, 1998. I have never held any other judicial office.

This is a court of general jurisdiction serving approximately one-half million citizens. I have presided over 6,400 civil, criminal and juvenile cases. Throughout my six years in office, I managed 281 trials including 148 jury and 133 non-jury trials. From these trials, a conviction has never been reversed nor a new trial granted on account of trial error.

15. **Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

15 (1) **Significant Opinions** (Alphabetical according to Plaintiff)
(Chester County Reporter Opinions may be found at *http://chester.paopinions.org*)

1. *Jane Buhl and James Buhl v. Allstate Insurance Co.*, 46 Pa. D. & C.4th 219 (2000)
2. *City of Coatesville v. Zoning Hearing Board et al.*, 48 Pa. D. & C.4th 169 (2001)

3. *Janice Coffey and Robert Coffey, h/w v. Minwax Co., et al.*, 2000 WL 1844603 (Pa. Super. 2000) **(copy of Opinion is included)**
4. *Commonwealth of Pennsylvania v. Martin Friedman,* 47 Ches.Co.Rep. 174 (1999)
5. *Commonwealth of Pennsylvania v. Aurelio Merced,* Criminal Action No. 2256-02, Sánchez, J. (2002) **(copy of Opinion is included)**
6. *Downingtown Area School District v. Teamsters Local 384,* 50 Ches.Co.Rep. 464 (2002)
7. *Anthony Fragale and Donna Fragale, h/w v. Mark P. Brigham, M.D.,* Civil Action No. 95-10852, Sánchez, J. 331 (1999) **(copy of Opinion is included)**
8. *In Re: Richard Greist,* 47 Ches.Co.Rep. 140 (1999)
9. *In Re: Appeal of Hershey's Mill Homeowners Association, From the Decision of the Board of Assessment Appeals for Chester County, Pa for the year 1998 Relating to the Property Located at Chandler Drive, West Chester, East Goshen Township, Chester County, Pennsylvania,* 48 Ches.Co.Rep. 168 (2000)
10. *In Re: Condemnation of Lands of George M. Laughlin and Grace S. Laughlin Described in Record Book 886, Page 290 (Tax Parcel No. 41-05-165),* 50 Ches.Co.Rep. 134 (2002)

(2) **Appellate Opinions (Reversals and Negative Criticism)**

Civil Cases

Hammerheads of Downingtown, Inc. v. Pennsylvania Liquor Control Board, 822 A.2d 890 (Pa.Cmwlth. 2003) (Trial Court Opinion may be found at *http://chester.paopinions.org*)

Facts: Hammerheads appealed Board's decision denying the issuance of a New Resort Liquor License

Our Decision: Reversed Board's decision; applicant was of sound character and there was need for an additional liquor license

Appellate Court's Decision: Applicant was not found to be of sound character

O'Leary v. Calvitti and *Holland,* 809 A.2d 976 (Pa.Super. 2002) **(copy of Opinion is included)**

Facts: O'Leary had two contracts with Defendants to construct and house a pool; one contract had an arbitration clause and the other did not; Calvitti wants to compel arbitration

Our Decision: Defendant Calvitti waived his right to arbitration

Appellate Court's Decision: Waiver is a procedural matter to be decided by the arbitrator

Bernotas v. Superfresh Food Markets v. Acciavatti Assoc. and Goldsmith Assoc., 816 A.2d 225 (Pa.Super. 2002) (Trial Court Opinion may be found at *http://chester.paopinions.org*)

Facts: Plaintiff fell and was injured in a Superfresh Food Market; Defendant Superfresh entered into a contract with Defendant Acciavatti; Acciavatti agreed to indemnify Superfresh from any claim arising from the work provided by Acciavatti

Our Decision: Acciavatti must indemnify Superfresh because the indemnity clause sufficiently covers the incident in question; granted Superfresh's Motion for Summary Judgment
Appellate Court's Decision: Affirmed the trial court's order concerning Acciavatti's obligation to indemnify Superfresh and remanded concerning Goldsmith's obligation to indemnify Acciavatti; Supreme Court granted *allocatur* for this issue; No applicable Pennsylvania law; Appellate Court relied on law from sister jurisdictions

Regester v. County of Chester, Kennett Township, et al., 797 A.2d 898 (Pa. 2002)
(copy of Opinion is included)
Facts: Decedent suffered from a heart attack; his family called for an ambulance; although Defendant was located within two miles, it took nineteen minutes for the ambulance to arrive; Decedent aspirated on his vomit and died
Our Decision: Defendant is entitled to governmental immunity; Defendant Longwood Fire Company's Motion for Summary Judgment was granted; after remand, jury verdict was in favor of the Hospital
Appellate Court's Decision: Affirmed in part and reversed on issue concerning § 11(j)(2) of the Emergency Medical Services; the Court held § 11(j)(2) does not extend immunity to institutional, corporate, and organizational entities

Ryan v. Montgomery Oaks and *100 Percent, Inc.*, 778 A.2d 1256 (Pa.Super. 2001)
(Trial Court Opinion may be found at *http://chester.paopinions.org*)
Facts: Plaintiff and Defendants entered into an Agreement of Sale; the agreement contained a clause which gave Plaintiff the option to declare the agreement null and void if settlement did not occur by a particular date
Our Decision: Plaintiff's right to declare the agreement null and void did not expire; the plain words of the contract did not put an expiration date on Plaintiff's option
Appellate Court's Decision: Affirmed the trial court's decision that Plaintiff retained the right to declare the agreement null and void; reversed our decision finding 100 Percent, Inc. liable; the Court found the agreement between the two Defendants specifically limited 100 Percent's liability

Criminal Cases

Commonwealth of Pennsylvania v. Sharpe, 823 A.2d 1029 (Pa.Super. 2003)
(Trial Court Opinion may be found at *http://chester.paopinions.org*)
Facts: State Troopers responded to a 911 hang up call originating from Defendant's home; the Troopers wanted to make certain everything was fine at Defendant's residence and entered her home; Defendant did not consent to the Troopers entering her home; certain items were seized; the Troopers did not have a warrant
Our Decision: The Troopers' warrantless search of Defendant's home and subsequent seizure violated her rights under Article I, § 8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution
Appellate Court's Decision: The Troopers' entry was justified because of exigent circumstances; the Troopers had reason to believe someone was in need of emergency

help because of the unexplained 911 hang up calls; following remand, the Defendant was acquitted

Commonwealth of Pennsylvania v. Diaz, 797 A.2d 370 (Pa.Super. 2002)
(copy of Opinion is included)
Facts: Defendant filed a Motion to Suppress Evidence seized as a result of a traffic stop; the Commonwealth argued there was probable cause for the stop based upon the suspect descriptions and the timing of the vehicle's appearance
Our Decision: The Defendant's Motion to Suppress Evidence was granted because the Officer did not have probable cause or articulable facts to support the stop
Appellate Court's Decision: The Officer, under the totality of the circumstances, had reasonable suspicion to stop the car

Commonwealth of Pennsylvania v. Kirkner, 805 A.2d 514 (Pa. 2002)
(Trial Court Opinion may be found at *http://chester.paopinions.org*)
Facts: Police reported to a domestic dispute at Defendant's home; Defendant's wife stated her husband pushed and choked her; the couple was working through their marital problems and, as a result, the wife refused to testify at trial despite the service of a subpoena
Our Decision: The Commonwealth's subpoena was quashed in the interest of maintaining the Kirkner's marriage; the decision was made in reliance on *Commonwealth v. Hatfield*, 406 Pa. Super. 139, 593 A.2d 1275 (1991), which gave the Trial Court discretion in deciding whether or not to force an unwilling spouse to testify
Appellate Court's Decision: Held the Trial and Appellate Courts' reliance on *Hatfield* was "understandable," and then ruled *Hatfield* was in error; following remand, the jury returned an acquittal in 15 minutes

Commonwealth of Pennsylvania v. Petock, 742 A.2d 208 (Pa. Super. 1999)
(copy of Opinion is included)
Facts: Defendant drove his Jeep onto the real property of a University, leaving deep ruts in the grass; the Officer witnessed this and issued the Defendant a citation for trespass with vehicle in violation of 75 Pa.C.S.A. §3717(c)
Our Decision: 75 Pa.C.S.A. §3717(c) is applicable to the University in order to protect such a public institution from unfettered vandalism
Appellate Court's Decision: 75 Pa.C.S.A. §3717(c) applies only to privately-owned property; the University's property is state-owned and, therefore, this statute does not apply

(3) **Significant Opinions Regarding Constitutional Issues**
(Chester County Reporter Opinions may be found at *http://chester.paopinions.org*)

1. Trial Court - *Commonwealth of Pennsylvania v. Robert Zukowski,* 50 Ches.Co.Rep. 361 (2002)
Appellate Court - *Commonwealth of Pennsylvania v. Robert Zukowski,* 832 A.2d 547

(Table) (Pa. Super. 2003)

2. Trial Court – *Robert Kappe, individually and t/a Robert Kappe Associates and Grant E. Nelson, III, Henry Hiddleson and George A. Roos t/a HNR Associates and John P. Connell Enterprises v. West Chester Borough,* 49 Ches.Co.Rep. 255 (2001)
Appellate Court - *Pending*

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

In 1990, I was elected as the Chester County Republican Party committeeman to represent the citizens in the East Downingtown West Precinct in Downingtown, Chester County, Pennsylvania. I was re-elected to that political office four times and served in that office until my resignation to run for the judicial position I now hold. In 1992 I was unsuccessful for my bid for a seat on the Downingtown Home Rule Charter Commission. After losing the election in 1992, however, I was appointed to serve for a period of one year as Commissioner. Additionally, the Chester County Board of Commissioners appointed me to a five-year term on the Housing Authority of Chester County.

17. **Legal Career:**

a. **Describe chronologically your law practice and experience after graduation from law school including:**

1. **whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;**

No. I have never served as clerk to a judge.

2. **whether you practiced alone, and if so, the addresses and dates;**

Solo Practitioner
West Chester, PA 19380
July 1990 to April 1997

I maintained a private general solo practice representing Spanish-speaking Chester County citizens in a wide variety

of legal areas for seven years prior to becoming a judge. My civil litigation experience included administrative hearings, arbitrations, non-jury trials and jury trials.

3. **the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;**

MacElree, Harvey, Gallagher, Featherman & Sebastian
17 West Miner Street
West Chester, PA 19381
May 1997 to December 1997

Before I was elected to the bench, I worked with the law firm of MacElree, Harvey, Gallagher, Featherman & Sebastian as a trial attorney in the civil litigation department handling personal injury, employment, civil rights, and public education expulsion cases. I worked with the MacElree, Harvey, Gallagher, Featherman & Sebastian law firm for approximately seven months.

Chester County Public Defender's Office
West Chester, PA 19380
August 1983 to April 1997

On April 10, 1997, I resigned my post as a senior trial attorney with the Chester County Public Defender's Office to manage my judicial election campaign committee. I worked for the Chester County Public Defender's Office from August 15, 1983 to April 10, 1997. Additionally, I maintained a general legal practice with concentration in the areas of personal injury litigation, workers' compensation, juvenile dependency, parental termination, adoptions, custody, family law, employment, social security disability and public education expulsion matters from July 1990 to April 10, 1997.

Nester, Nester & Sánchez
Rt. 23 and Rt. 100
Bucktown, PA 19465
August 1983 to July 1990

I was a partner with the law firm of Nester, Nester & Sánchez in West Chester, PA, handling a wide variety of civil matters including, but not limited to, personal injury, litigation, workers' compensation, adoptions, juvenile dependency, parental termination, real estate, employment, unemployment, social security disability, custody and public education expulsion matters.

b. **1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?**

1981-1983
Legal Aid of Chester County
West Chester, PA 19380

As a young trial attorney, I worked for two years as a staff attorney for Legal Aid of Chester County, Inc. and recovered the first attorney fees for Legal Aid under the Equal Access to Justice Act. I handled a full caseload representing indigent people involving a wide variety of areas, including unemployment compensation, social security disability, immigration, landlord-tenant, spousal abuse, family matters and federal and state appeals. I also provided assistance and support to grassroots community groups and organizations helping the unemployed and homeless in our community.

1983-1997
Chester County Public Defender's Office
West Chester, PA 19380

Working as a Senior Trial Attorney for the Chester County Public Defender's Office from 1993 to 1997, I represented over 2,500 indigent defendants, and tried 65 jury trials and 40 non-jury trials. Throughout my years in the Public Defender's Office, I progressed from handling preliminary hearings to ultimately becoming a Senior Trial Attorney. I managed an annual caseload of about 350 to 400 cases, and argued cases before both the Superior and Supreme Courts of Pennsylvania.

1983-1990
Nester, Nester & Sánchez
Bucktown, PA 19465

As a partner with the law firm of Nester, Nester & Sánchez, I gained experience handling a variety of civil matters including, but not limited to, personal injury litigation, workers' compensation cases, adoptions, juvenile dependency matters, parental termination cases, real estate, employment, unemployment, social security disability cases, custody and public education expulsion matters.

1997
MacElree, Harvey, Gallagher, Featherman & Sebastian
West Chester, PA 19381

I joined MacElree, Harvey, Gallagher, Featherman & Sebastian after the primary election because I resigned my post with the Public Defender in order to run for office. In the firm's civil litigation division I handled personal injury, employment, civil rights and public education expulsion cases. This experience provided me an excellent transition to the Bench.

1998-Present
Judge, Court of Common Pleas, 15th Judicial District of Pennsylvania
West Chester, PA 19380

During my tenure, I have dealt with thousands of civil and criminal cases. I presided over approximately 6,400 cases, of which 326 were appealed. Of the 326 appeals, I was reversed 9 times for a reversal rate of 2.76%. My experience on the bench has been both rewarding and productive. I have continually been one of the top judges in Chester County in the number of jury and non-jury trials heard (both criminal and civil).

2. **Describe your typical former clients, and mention the areas, if any, in which you have specialized.**

Over the course of my legal career, I represented poor working class people in civil and criminal matters. I provided excellent representation to many Spanish-

speaking Chester County citizens working in the mushroom farms.

c. 1. **Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.**

I appeared in state court to handle criminal cases on a daily basis. As a Senior Trial Attorney in Chester County, I handled over 2,500 cases, including 65 jury trials and 40 non-jury trials. I was assigned to represent eight (8) defendants in murder trials, including two death-penalty cases, during my tenure with the Public Defender's Office. Additionally, I managed an annual caseload of approximately 350 to 400 felony and misdemeanor cases with a disposition rate of 25-30 cases per month. As a result of my frequent court appearances, I obtained extensive trial and appellate court experience, including numerous appearances before the Pennsylvania Superior and Supreme Courts.

2. **What percentage of these appearances was in:**

(a) federal courts

Approximately .5%
While working for Legal Services, I appeared before Federal District Court Magistrates in bankruptcy and immigration cases.

(b) state courts of record

99%

(c) other courts

Approximately .5%
Unemployment compensation, workers' compensation, welfare entitlement hearings, and Administrative Law Judges in social security disability cases.

3. **What percentage of your litigation was:**

(a) civil 25%

(b) criminal 75%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

As a Senior Trial Attorney, I handled over 2,500 cases, of which 65 were jury trials and 40 were non-jury trials. I was sole or lead counsel in the predominate amount of these cases.

5. What percentage of these trials was:
(a) jury 2.5%

(b) non-jury 2%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Litigation (Chronological Order by Date of Representation)

1. *Commonwealth of Pennsylvania v. Harry Rivenbark*, Docket No. 01741-80 (1980-85); 518 A.2d 327 (Pa. Cmwlth. 1986); 501 A.2d 1110 (Pa. 1985)
Summary – Defendant was convicted of a federal firearms violation and the Board of Probation and Parole ordered parolee recommitted as a technical violator and as a convicted parole violator
Party Represented / Date – Harry Rivenbark / 1983-85 (Represented Defendant in the Pennsylvania Superior Court and the Pennsylvania Supreme Court)
Nature of Participation – Assisted in formulation and presentation of

Defendant's defense
Final Disposition - Parolee could not be recommitted to separate terms of back time as both a convicted parole violator and a technical parole violator, where technical violation of parole was based upon the same act which constituted a new crime of which parolee was convicted
Court's Name / Judge's Name – Pennsylvania Superior Court; Pennsylvania Supreme Court / Judge MacPhail (Superior Court); Judge McDermott (Supreme Court)
Co-Counsel – John R. Merrick, Esquire; Robert J. Donatoni, Esquire; William G. Brown, Esquire, Chester County Public Defender's Office, 17 N. Church Street, Suite 313, P.O. Box 2748, West Chester, PA 19380-0991; 610- 344-6940
Opposing Counsel - Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

2. *Commonwealth of Pennsylvania v. Angel Lopez Flores,* Docket No. 00509-88 (1988)
Summary – Defendant could not speak English and was wrongfully incarcerated (mistaken identity); I spoke Spanish with Defendant and uncovered police department's mistake
Party Represented / Date – Angel Lopez Flores / 1988
Nature of Participation – Lead Counsel
Final Disposition – Defendant Released; Costs on the County of Chester
Court's Name / Judge's Name – Pennsylvania Court of Common Pleas / Judge Thomas G. Gavin
Opposing Counsel – Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

3. *Commonwealth of Pennsylvania v. Jeffrey S. Emerson,* Docket No. 01639-89 (1989)
Summary – First Degree Murder (Drowning)(Death Penalty case / Aggravating Circumstances – 1.torture 2.killing committed during perpetration of a felony); Kidnapping
Party Represented / Date – Jeffrey S. Emerson / 1989
Nature of Participation – Lead Counsel
Final Disposition – Plea Bargain (Life Imprisonment)
Court's Name / Judge's Name – Pennsylvania Court of Common Pleas / Judge Lawrence E. Wood
Opposing Counsel – John J. Crane, Esquire, Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

4. *Commonwealth of Pennsylvania v. James C. Allen,* Docket No. 00878-90 (1990)
Summary – First Degree Murder (strangulation)
Party Represented / Date – James C. Allen / 1990

Nature of Participation – Lead Counsel
Final Disposition – Alford Plea (Voluntary Manslaughter)
Court's Name / Judge's Name – Pennsylvania Court of Common Pleas / Judge Thomas G. Gavin
Opposing Counsel – Patrick Carmody, Esquire, Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

5. *Commonwealth of Pennsylvania v. Chad Franciscus,* Docket No. 04684-91 (1992); 668 A.2d 1189 (Pa. Super 1995); 710 A.2d 1112 (Pa. 1998)
Summary – First Degree Murder
Party Represented / Date – Chad Franciscus / 1991-92
Nature of Participation – Co-Counsel (represented only at Trial Court level)
Final Disposition – Alford Plea (Third Degree Murder)
Court's Name / Judge's Name – Pennsylvania Court of Common Pleas; Pennsylvania Superior Court; Pennsylvania Supreme Court / Judge Thomas G. Gavin (Trial Court)
Co-Counsel – Jenny Steinen, Esquire, Chester County Public Defender's Office, 17 N. Church Street, Suite 313, P.O. Box 2748, West Chester, PA 19380-0991; 610- 344-6940
Opposing Counsel – Robert Louis Miller, Esquire, Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

6. *In Re: Juvenile A and Juvenile B,* (1992)
Summary – Two junior high school students were charged for sexually assaulting a 13-year-old girl in the balcony of the school's auditorium
Party Represented / Date – Juvenile A / 1992
Nature of Participation – Lead Counsel
Final Disposition – Acquittal
Court's Name / Judge's Name – Pennsylvania Court of Common Pleas / Judge Charlie B. Smith
Co-Defendant's Counsel – Robert Brendza, Esquire (Law Offices of Robert Brendza, Exton, PA 19341)
Opposing Counsel - Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

7. *Commonwealth of Pennsylvania v. Rafael Chavez,* Docket No. 2427-93 (1994)
Summary – First Degree Murder (firearm)
Party Represented / Date – Rafael Chavez / 1994
Nature of Participation – Lead Counsel
Final Disposition – Plead to 3rd Degree Murder
Court's Name / Judge's Name – Pennsylvania Court of Common Pleas / Judge Joseph Melody

Co-Defendant's Counsel – Stephen I. Baer, Esquire, Chester County Public Defender's Office, 17 N. Church Street, Suite 313, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6940
Opposing Counsel – Patrick Carmody, Esquire, Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

8. *Commonwealth of Pennsylvania v. Glenn A. Johnson,* Docket No. 364-95 (August 9th, 1995); 690 A.2d 274 (Pa. Super. 1997)
Summary – Sexual assault of a minor; Defendant filed a Motion to Suppress oral statements, alleging they were coerced in violation of the Fifth Amendment of the Constitution of the United States and Article I, Section 9, of the Pennsylvania Constitution
Party Represented / Date – Glenn A. Johnson / August 1995
Nature of Participation – Participated in all aspects of the trial (represented Defendant at Trial and Appellate Court levels)
Final Disposition – Trial Court granted Defendant's Motion to Suppress Statements; Appellate Court reversed only on issue of whether a Trial Court may exclude medical testimony that the absence of evidence of physical trauma is consistent with incidents of sexual abuse; Appellate Court found such testimony is admissible
Court's Name / Judge's Name – Pennsylvania Court of Common Pleas; Pennsylvania Superior Court / Judge Paula Francisco Ott (Trial Court)
Opposing Counsel – Daria A. Tecco, Esquire, Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

9. *Commonwealth of Pennsylvania v. Antonio Salcedo,* Docket No. 00585-86
Summary – First Degree Murder
Party Represented / Date – Antonio Salcedo / 1996
Nature of Participation – Lead Counsel
Final Disposition – Plead to Third Degree Murder
Court's Name / Judge's Name - Pennsylvania Court of Common Pleas / Judge Howard F. Riley Jr.
Opposing Counsel – Susan Lynn Fields, Esquire, Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

10. *Commonwealth of Pennsylvania v. Adam Paul Stout,* Docket No. 04301-96
Summary – Armed Robbery (Juvenile – 15 years old)
Party Represented / Date – Adam Paul Stout / 1996
Nature of Participation – Lead Counsel
Final Disposition – Plead Guilty to charges
Court's Name / Judge's Name – Pennsylvania Court of Common Pleas / Judge Charles Smith

Opposing Counsel – Robert Miller, Esquire, Chester County District Attorney's Office, 17 N. Church Street, Suite 218, P.O. Box 2748, West Chester, PA 19380-0991; 610-344-6801

19. **Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)**

I have devoted a substantial part of my professional life to the improvement of the criminal justice system and to guaranteeing equal rights before the law. I represented many Latino individuals and groups in connection with housing, employment and immigration matters. I helped to implement programs by which qualified interpreters were available in criminal cases involving people of limited English proficiency. I also served on a committee formed to address the special needs of Latino victims, witnesses and defendants appearing before district justices. I spend much of my free time speaking to school, youth and community groups about the importance of staying in school, striving for success, and overcoming adversity. On March 2, 2001, former Governor Tom Ridge recognized my many years of service to the Latino community with the Criminal Justice and Human Rights Award.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

Commonwealth of Pennsylvania State Employees' Retirement System – (as of 12/01/03)

Option 1 – withdrawal amount : $0
monthly benefit : $580.16

Option 2 – withdrawal amount : $38,140.64
monthly benefit : $402.67

I do not anticipate any other receipts of monies from deferred income arrangements, stock, options, uncompleted contracts or other future benefits derived from previous business relationships, professional services, firm memberships, former employers, clients, or customers.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

Although I do not anticipate any potential conflicts of interest, if a conflict arises, I will follow the Code of Judicial Conduct guidelines giving appropriate consideration to: (1) whether I can fairly decide the case on the facts and law; (2) whether recusal is required to avoid even the appearance of impropriety; and (3) whether my impartiality might be reasonably questioned because of an interest that can be substantially affected by the outcome of the proceeding. While recusal is not to be taken lightly, if the judicial process requires such action to maintain its integrity, then I would recuse myself. In addition, I am mindful that recusal should not be readily used simply to avoid difficult cases. It is an important safeguard that protects the veracity of our court system and prevents the appearance of impropriety.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

Time permitting, I would like to continue with my teaching position as an adjunct professor with the Villanova University School of Law.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See separate Financial Disclosure Report (AO-10)

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached Net Worth Statement

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I held a number of positions in the Chester County Republican Party prior to becoming a Judge, including:

Republican Committeeman
Precinct - East Downingtown West, 1990 to 1997

Assistant General Counsel to the Chester County Republican Party
1990-1994

Vice Chairman, Area 12 Republican Committee
1990-1994

Republican Campaign Committee
Member 1990—1996

Republican Campaign Committee
Candidate Profile Subcommittee Chairman
1995-1996

Between 1990 and 1997, I worked on numerous Republican candidates' campaigns at the state and county level, particularly the campaign for State Representative Jim Gerlach (now Congressman Gerlach), Judge Paula F. Ott, Commissioner Karen Martynick, Downingtown Borough Councilman Earl Reynolds, District Justice Rita A. Arnold, Campaign Coordinator for Sandra Schultz Newman, Councilman William Mason, Representative Curt Schroder, Governor Tom Ridge (now Director of Homeland Security) and appointed to the Citizens for Good Judges Committee.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year 2002

Report Required by the Ethics in Goverament Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
SANCHEZ, Juan R	District Court - E.D. PA	12/1/03
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Dist Judge - E.D. Pa Nominee	5. ReportType (check appropriate type) (●) Nomination, Date 11/25/03 ( ) Initial ( ) Annual ( ) Final	6. Reporting Period 1/1/02 to 12/1/03
7. Chambers or Office Address Chester County Cthse, Ste 230 2 N High St C/R #6 POBox 2748 West Chester PA 19380-0991	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Trustee	Community Volunteers in Medicine
2.	Director	YMCA of the Brandywine Valley

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	12/01/03	Com of PA State Employees Retirement System; Upon age eligibility, I will be entitled to an annuity from my vested pension account.

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2003	Immaculata University - Jan 1 through Oct 31, 2003	1,300
2.	2003	West Chester University - Adjunct Professor - Criminal Justice	3,826
3.	2003	Villanova Law School - Adjunct Professor Trial Practice	4,800

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	SANCHEZ, Juan R	12/1/03

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
4.	2002	Administrative Offices of Pennsylvania Courts	119,315
5.	2003	Administrative Offices of Pennsylvania Courts	121,225

DEC. 1. 2003 7:27PM JUDGES_CHAMBERS_OFC 044 0740 NO.0002 P. 4/7

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	SANCHEZ, Juan R	12/1/03

IV. REIMBURSEMENTS – transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Sallie Mae Servicing	Student Loan	K
2.	Citifinancial	Note Payable to Bank	K

FINANCIAL DISCLOSURE REPORT
Page 1 of 1

Name of Person Reporting	Date of Report
SANCHEZ, Juan R	12/1/03

VII. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
1. Com of PA State Employees Retirement System	E	Pension	K	W	Exempt				

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000		
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000			
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
	U = Book Value	V = Other	W = Estimated			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	SANCHEZ, Juan R	12/1/03

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

Section II - Agreements

Line 1 - Parties and Terms.

Option 1- Withdraw 0 - Monthly benefit $580; Option 2 - withdraw $38,140.64 - monthly benefit $402.67

Section VII. Investments and Trusts

Line 1.

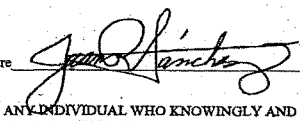
Vested pension account balance $38,140.64. No income has been derived from this account for the reporting period January 1, 2002 through December 1, 2003

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	SANCHEZ, Juan R	12/1/03

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature  Date 12/1/03

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT
NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS			LIABILITIES		
Cash on hand and in banks	400		Notes payable to banks-secured		0
U.S. Government securities-add schedule		0	Notes payable to banks-unsecured (Citifinancial)	29,859	
Listed securities-add schedule		0	Notes payable to relatives		0
Unlisted securities--add schedule		0	Notes payable to others		0
Accounts and notes receivable:		0	Accounts and bills due	2,900	
Due from relatives and friends		0	Unpaid income tax		0
Due from others		0	Other unpaid income and interest		0
Doubtful		0	Real estate mortgages payable-add schedule	141,059*	0
Real estate owned-add schedule (residence)	225,000*	0	Chattel mortgages and other liens payable		0
Real estate mortgages receivable		0	Other debts-itemize:		
Autos and other personal property	30,000				
Cash value-life insurance		0	3 Open Capital One Accounts approx.	6,800	
Other assets itemize:			Sallie Mae Servicing	18,563	
			Auto Loans	26,000	
			Auto Insurance	2,114	
			Total liabilities	229,236	
			Net Worth	26,164	
Total Assets	255,400		Total liabilities and net worth	255,400	
CONTINGENT LIABILITIES			GENERAL INFORMATION		
As endorser, comaker or guarantor	None		Are any assets pledged? (Add schedule)	NO	
On leases or contracts	None		Are you defendant in any suits or legal actions?	NO	
Legal Claims		0	Have you ever taken bankruptcy?	NO	
Provision for Federal Income Tax		0			
Other special debt		0			

*See Net Worth Continuation Sheet 1

Financial Statement
Net Worth - Continuation Sheet 1

Assets:

Real Estate Owned:

Frame Single Family Dwelling at
[redacted]
Downingtown, PA 19335

Value: $225,000

Liabilities:

Real Estate Mortgage Holder:

OCWEN Federal Bank FSB
Central Florida Research Park
12650 Ingenuity Drive
Orlando, FL 32826

Loan No. 101156420

Balance due as of 12/1/2003 $141,059 at 7.440%

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

In order to fulfill my responsibilities under Canon 2 of the American Bar Association's Code of Professional Responsibility, I dedicated my career to serving the disadvantaged in Chester County. I worked serving poor citizens both in Legal Aid of Chester County for two years and in the Chester County Public Defender's Office for 14-1/2 years. I was a volunteer member with the Legal Aid of Chester County Board of Directors and many other organizations serving the poor and homeless in our County. These organizations include the Housing Authority of Chester County, United Way of Chester County, Corporate Board of the YMCA of Central Chester County and Centro Guayacan. I still serve on the Board of Directors of Community Volunteers for Medicine, a non-profit organization serving poor citizens without health insurance, and the YMCA of Brandwyine Valley. Lastly, I volunteered many pro bono hours through the Chester County Bar Association Pro Bono Program as an attorney. I still participate in the Bar Association's Youth Legal Education Program.

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

I have never been a member of an organization that invidiously discriminates on the basis of race, sex, or religion.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which**

led to your nomination and interviews in which you participated).

In the Eastern District there is a Selection Commission that recommends candidates for nomination to the federal courts. The Selection Commission recommended my nomination for appointment to the federal court. The District Selection Commission interview process is two-tiered. First, a three-member panel conducts interviews and selects candidates to appear in front of the entire Commission and then decides which candidates to recommend. I was also interviewed by White House Counsel and the FBI and completed various forms for the White House, FBI and the Department of Justice.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No. Individuals involved in the selection process did not discuss with me any specific case, legal issue or question to ascertain how I would rule on such case, issue or question.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The framers of the United States Constitution established a system of checks and balances for our nation's three branches of government to safeguard the liberties of its citizenry. This system operates on a simple premise, Judges should interpret the law made by Congress and enforced by the Executive. Consequently, a Judge's role is to thoughtfully apply the law, not to create it. A Judge should not advance his or her political or social views, rather he or she should preserve the integrity of the judicial system by making decisions based on the law. Judges should cautiously apply the law without exceeding their constitutional authority and should give deference to settled case law.

Chairman HATCH. We are grateful to have all of you here, and we look forward to moving your confirmations as quickly as possible. And from what I see, there should be no real difficulty in moving those confirmations.

I think what I will do is turn to my colleagues and see what questions you would care to ask, if any, of these nominees.

Senator KOHL. Thank you very much. I will ask Justice Sykes a couple of questions.

Justice Sykes, you are still in the early stages of a 10-year term on the Wisconsin Supreme Court. Could you tell us why you want to leave that position for the Seventh Circuit?

Justice SYKES. Yes, Senator. I absolutely love my job. It is a great privilege and an honor to serve the people of the State of Wisconsin as a member of the Wisconsin Supreme Court, and it was a privilege to serve as a trial court judge in Milwaukee County for 7 years prior to that.

I view this opportunity as an opportunity to do the work of an appellate judge that I have been doing on the Supreme Court for the last 4 and a half years for the people of three States: my own home State of Wisconsin as well as the States of Illinois and Indiana within the jurisdiction of the Seventh Circuit Court of Appeals. And that is the reason that I pursued this appointment. I absolutely enjoy the work that I'm doing now. It is challenging and rewarding, and I have tried to make a contribution to my current court for the last 4 and a half years, and I see this as an opportunity to do the same sort of work at a different level in our judicial system and serve the people of three States.

Senator KOHL. For many years, conservatives have criticized liberal judges for being activist, and now we hear much about conservative activism as the current Supreme Court has struck down parts of more statutes in the past few years than at almost any time in our history. How would you define "judicial activism"? And do you agree that it is to be avoided?

Justice SYKES. I agree that it is to be avoided. The judicial philosophy that I abide by in my work as a judge, both as an appellate court judge in the State's highest court and as a trial court judge, is a philosophy of judicial restraint. I do not believe in legislating from the bench. I believe in deference to the legislative branch of government and the policy choices that the legislative branch of government makes in enacting statutes.

And so my approach to judicial decisionmaking is one of deference to the legislation branch and one of judicial restraint.

Senator KOHL. Thank you. And, finally, the Governor of Wisconsin has indicated that he is rather pleased that you are being elevated to this position. Why does he have that position? Do you know why he feels that way?

[Laughter.]

Justice SYKES. That is by virtue of the Wisconsin Constitution. We have an elected judiciary, as you know, in the State of Wisconsin, a non-partisan elected judiciary. In the event of a midterm vacancy, the sitting Governor replaces judges of the lower courts or justices of the State Supreme Court for an interim period until the next election cycle when that appointed justice runs for election on the statewide ballot.

Senator KOHL. Thank you.

Chairman HATCH. We will turn to the Senator from Idaho.

Senator CRAIG. Well, Mr. Chairman, I have no questions of any of the three. I congratulate all of you on your nominations. I trust that your experience—and I have reviewed some of your record—will serve us well in your future endeavor, and I congratulate you all.

Judge SANCHEZ. Thank you, Senator.

Justice SYKES. Thank you, Senator.

Mr. ROBART. Thank you, Senator.

Chairman HATCH. Senator Feingold?

Senator FEINGOLD. Mr. Chairman, I have no questions. Thank you.

Chairman HATCH. Well, thank you.

Let me just ask a few. Frankly, I know your backgrounds, have studied them. I know quite a bit about each of you, and I am very pleased with your nominations. I think you are good people who will do a good job on the bench. And I agree with Senator Kohl; there should not be judicial activism from the left or from the right. And it particularly rankles me when it comes from the right. But it rankles me both ways. I want you to know that. At least one circuit court in this country is considered the activist poster child for all activist judges, and it has hurt that court tremendously. So we hope in your case, Justice Sykes, that you will add a lot of dignity to whatever court you are on, but in particular this court.

Now, your ability to constructively interact with your fellow judges on the Seventh Circuit is going to be a very important element of your work. Could you speak for a moment about the role of collegiality? And please indicate how you plan to contribute to it once you join the Federal bench.

Justice SYKES. Yes, thank you, Mr. Chairman. I believe that collegiality is a very important component of operating as an appellate court judge. And I have attempted to keep that in mind in every decision on every case that I participate in with my colleagues on the Wisconsin Supreme Court.

I think that involves a process of keeping focused on the legal issues and the facts of the cases that are before the court instead of personality differences or differences of opinion that members of the court have had in the past.

I think it also involves setting aside slights and really checking your ego at the door, if that's at all possible in a conference room that has a lot of intellectual give and take. It's very important to set aside those personal differences, set aside any differences, any power struggles, anything that's extraneous to the facts and the law in the case at hand, and keep focused on the facts and the law in the case at hand in order to reach a collegial decision with the other members of the court. And when we disagree, we attempt to do it agreeably. And when we are in dissent or in opposition to one another, we attempt to do that respectfully.

Chairman HATCH. So we don't expect any biting dissents from you?

[Laughter.]

Justice SYKES. Well, biting, no. But strong and forceful perhaps.

Chairman HATCH. But we have biting dissents from time to time. It is just good for the judiciary. No, I am just kidding.

I understand that you teach several times a year in the Challenges and Possibilities Program at the Green Bay Correctional Institution, a rehabilitative program for inmates at the prison. Could you just tell the Committee a little bit about your work there?

Justice SYKES. Yes. It's a rehabilitative program at the Green Bay Correctional Institution, which is a maximum security institution in the State of Wisconsin. It houses mostly younger offenders, and the program attempts to get these prison inmates ready for reintegration into society by working on concepts such as acceptance of personal responsibility for their acts, developing victim empathy, and also learning more about the legal system and the process that their cases were adjudicated by. Many of these inmates believe that the system is out to get them and that they have been unjustly convicted, and so the purpose of this program is to sort of break down some of those barriers so that there is a greater chance at real internal rehabilitation for these inmates. And my role in this program has been to, three or four times a year, teach a session on sentencing law in Wisconsin so that the inmates in the prison understand why it is that the sentence that was imposed in their case was, in fact, imposed according to the law of the State of Wisconsin.

Chairman HATCH. Well, I appreciate your doing that. I think you do a lot of good in doing that type of service. Personally, I think you are a wonderful nominee, and we look forward to having you confirmed. If we could get all the Senators to agree, I would put her on—I would put all three of these on tomorrow's markup if we could agree to it. Would you mention it to your colleagues? I will mention it to mine and see if we can do that. I think Senator Leahy would agree. Now, if he does not, then we would have to wait until after the recess. But I would try to move you as quickly as I possibly can.

Justice SYKES. Thank you.

Chairman HATCH. All three of you.

Mr. Robart, you come before us highly recommended. I notice that you worked with the Evergreen Legal Services in the State of Washington. How has that experience affected you as an attorney? And, also, how will it affect you as a judge?

Mr. ROBART. Thank you, Senator. The opportunity of working in a large law firm is a special one, but one of the things that it does is it tends to select out a particular group of clients that come for the very specialized services that large law firms tend to offer.

I think my time at Evergreen Legal Services had two very important functions for me. One was I was introduced to people who in many times felt that the legal system was stacked against them or was unfair. And one of the things, I think, that my time there helped accomplish was to show them that the legal system was set up for their benefit and that it could be, if properly used, an opportunity for them to seek redress if they had been wronged.

And the second part of it is that working with people who have an immediate need and an immediate problem that you are able to help with is the most satisfying aspect of the practice of law. I think in terms of—if I am fortunate enough to be confirmed by the

Senate, I will take that experience to the courtroom with me, recognize that you need to treat everyone with dignity and with respect, and to engage them so that when they leave the courtroom they feel like they had a fair trial and that they were treated as a participant in the system.

Chairman HATCH. Well, thank you. That is a great answer.

Let me go to you, Judge Sanchez. You know, in your questionnaire you mentioned that you taught at Westchester University, Immaculata University, and Villanova University School of Law. Now, how, if at all, do you think that your teaching experience made you in your job as a Federal district court judge?

Judge SANCHEZ. I enjoy teaching because I firmly believe that teaching people about the law teaches them to respect our institutions and become better citizens. So I have a real passion for teaching, especially youngsters at college, high schools, and intermediate schools, and I make myself available to do that as much as possible because it is important for citizens to understand and respect the law and our public institutions. And I think that that will make me a good district judge because I have utmost respect for the law and work to improve it. And I think those qualities and the appreciation I have and love for people will allow me to serve with honor and distinction on the Eastern District Court.

Chairman HATCH. Well, thank you. I think that an important element of our judiciary is that all persons have equal access to the law. Now, you have had extensive pro bono experience as a public defender, and that ought to really help you to serve—

Judge SANCHEZ. It's a humbling experience.

Chairman HATCH. Yes, it is a humbling experience, but it will really help you to serve well in the impartial administration of justice. So I commend you for that, and I am proud of what you have done there. And I think all three of you are excellent nominees, and I will personally do everything I can to see that you are put through the Judiciary Committee as fast as we can. Maybe we can—I don't want to get your hopes up. We may not be able to get you on tomorrow's markup, but if we can, I would like to do so because I don't see any reason to delay at all in any of these judges, but particularly in your cases.

So we will see what we can do. If we can't, don't be disappointed, because as soon as we get back from the recess, you will be on that list, if you are not on tomorrow. But I just want to compliment each of you for the excellent people you are, the excellent reputations that you have, and the excellent service that you have given. And I think your families and friends and fiancee ought to be pretty impressed, is all I can say.

Did you want to say something else?

Judge SANCHEZ. I just wanted to say thank you, Chairman Hatch, for the opportunity.

Chairman HATCH. That is okay. You can add that. I wouldn't try answering anything else.

[Laughter.]

Chairman HATCH. You never know.

Well, with that, I am proud of all of you. I have extensively looked at your records. I find them to be exemplary and the highest caliber in all three cases, and I think my colleagues will as well.

So we will move ahead on that basis and wish you all well. And when you get there, just remember one thing. The closest thing to godhood in this life is being a Federal judge—at least a lot of Federal judges believe that.

[Laughter.]

Chairman HATCH. And one of the worst things about some of them is they get on the Federal bench and they really do believe they are gods. And all of a sudden they don't seem to have the humility that they have otherwise. Now, I am not saying all of them. Naturally I am proud of our Federal judiciary. But occasionally, the ones occasionally who violate these principles generally turn out to not do justice nearly as well as those who don't violate them.

So just remember everybody who comes before you has problems. Everyone that comes before you has different abilities. Some of these young lawyers don't know the Rules of Evidence as well as others know it. Some of them will need a little help and assistance and maybe a little forbearance from time to time. Some of the big shots are so good that sometimes they become a little overbearing, and it isn't a bit bad to set them down every once in a while and tell them they are getting overbearing.

But I think it is good to let people try their own cases and not have the judges trying the cases for them. On an appellate basis, it is difficult for you not to try and try their cases for them because you have got to ask very intelligent questions so that you can get to the bottom of whatever you think is important in that particular case that appears before you.

But my experience is that the Federal judiciary consists of a wide variety of people of the highest caliber, and we are so fortunate in this country. In my viewpoint, it is the judiciary that has saved the Constitution through all these years. It has not been the Congress of the United States. We pass unconstitutional legislation all the time—maybe not knowingly, but sometimes even knowingly, I think. I don't want to name names, but don't think I can't.

[Laughter.]

Chairman HATCH. And then, you know, the Presidents sometimes put up legislation or put up suggestions or act in executive ways that sometimes are unconstitutional. So it is important to have an honest, decent judiciary to correct those ills. And I am counting on all three of you to be humble, good, honorable, intelligent judges who will help us to have the best, continue to maintain the best judiciary in the history of the world.

So, with that, we are grateful to have you all here and your families, we welcome all of you, and we praise all of you for the good people you are, and we will recess until further notice.

[Whereupon, at 2:59 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS



CHAMBERS OF
DIANE S. SYKES, JUSTICE

SUPREME COURT
STATE OF WISCONSIN
P. O. BOX 1688
MADISON, WISCONSIN 53701

STATE CAPITOL, 16 EAST
(608) 266-1884

February 26, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Senator Durbin's questions

Dear Mr. Chairman:

Enclosed please find my answers to Senator Durbin's written questions regarding my nomination to the United States Court of Appeals for the Seventh Circuit.

Very truly yours,

Diane S. Sykes
Justice

dss/encls.

cc: The Honorable Patrick J. Leahy

Questions from Sen. Dick Durbin
for Diane Sykes, Nominee to the
U.S. Court of Appeals for the Seventh Circuit
February 19, 2004

1. Justice Sykes, you may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Judiciary Committee and the incidents of theft of memos and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant at Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years. At least one of the alleged perpetrators who used to work as Republican staff on this Committee has admitted publicly that a lot of the documents he stole related to judicial nominations. This former staff member was one of many Republican staff who handled judicial nominations for Chairman Hatch and subsequently for Majority Leader Frist. I'd like to ask you a series of questions concerning these unfortunate criminal incidents.

A. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer:

I did not meet with any staff of the Senate Judiciary Committee, other than Senator Kohl's Judiciary Committee counsel, who was present during my meeting with Senator Kohl on February 10, 2004, the day before my confirmation hearing. I have not received any information, documents, or excerpts of documents from Senate Judiciary Committee staff, or anything that appeared to be from Senate Judiciary Committee staff.

B. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer:

I met with staff of the U.S. Department of Justice on February 10, 2004, for the Department's standard confirmation hearing preparation session. I did not receive from the Department's staff, or anyone else, any information, documents, or excerpts of documents from Senate Judiciary Committee staff, or anything that appeared to be from Senate Judiciary Committee staff.

C. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer:

A member of the White House Counsel's Office staff participated in my confirmation hearing preparation session on February 10, 2004 at the U.S. Department of Justice. I did not receive from the White House Counsel's Office, or anyone else, any information, documents, or excerpts of documents from Senate Judiciary Committee staff, or anything that appeared to be from Senate Judiciary Committee staff.

D. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were lead to believe were obtained or derived from Democratic sources? Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer:

No.

2. President Bush has said publicly that he would appoint "strict constructionists" to the Supreme Court in the mold of Justices Scalia and Thomas.

A. Justice Sykes, according to press reports, you have described yourself as a strict constructionist. Do you stand by that description?

Answer:

I have not generally described myself as a strict constructionist. Rather, I have described myself as a judicial conservative. Judicial conservatism (as I understand and follow it) is generally characterized by the following decisional principles, well-established in our case law: judicial restraint; respect for precedent; deference to the legislative branch and its public policy choices; sensitivity to separation of powers; and an approach to legal interpretation that focuses on the plain language of the law, interpreted reasonably and in the context in which it is used.

I am aware that the term "strict constructionist" is generally applied to judicial conservatives, and I have on occasion acknowledged this "shorthand" terminology, recognizing that the two are often equated in the public mind. However, I believe that "strict constructionist" is too narrow a description of the judicial philosophy that I have described above, and so I generally do not use the term.

B. Would you consider your own judicial philosophy to be in the mold of Justices Scalia and Thomas? Why or why not?

Answer:

I would not describe my judicial philosophy as being in the "mold" of any particular justice, judge, or legal scholar. Rather, it is rooted in our history and legal tradition, in our common law, and in our jurisprudence of statutory and constitutional interpretation.

3. Do you believe that *Roe v. Wade* is consistent with strict constructionism? Why or why not? How about *Miranda v. Arizona*? Why or why not?

Answer:

This question requests a critique of certain United States Supreme Court cases that I am or will likely be required to interpret and apply as a judge in individual cases before the court. The Wisconsin Code of Judicial Conduct prohibits judges and candidates for judicial office from engaging in extra-judicial commentary with respect to particular cases or legal issues that would appear to commit the judge in advance or suggest a promise or commitment of a certain course of conduct in office regarding particular cases or legal

issues. See WI Supreme Court Rule 60.06(3). This ethics rule is binding upon me as a Wisconsin judge and candidate for appointed judicial office. I can unequivocally state, however, that I believe that Roe and Miranda are the law of the land, and if I am confirmed to the 7th Circuit, I would be duty-bound to follow and would follow these and all other precedents of the United States Supreme Court.

4. Some commentators have called *Roe v. Wade* and *Griswold v. Connecticut* unprincipled decisions. Do you agree that they are unprincipled decisions? Why or why not?

Answer:

This question requests a critique of certain United States Supreme Court cases that I am or will likely be required to interpret and apply as a judge in individual cases before the court. The Wisconsin Code of Judicial Conduct prohibits judges and candidates for judicial office from engaging in extra-judicial commentary with respect to particular cases or legal issues that would appear to commit the judge in advance or suggest a promise or commitment of a certain course of conduct in office regarding particular cases or legal issues. See WI Supreme Court Rule 60.06(3). This ethics rule is binding upon me as a Wisconsin judge and candidate for appointed judicial office. Again, however, I believe that Roe and Griswold constitute binding precedent, and I would follow these and all other Supreme Court precedents without hesitation if confirmed to the 7th Circuit.

5. Do you believe that it was a feat of judicial activism to read a right to privacy into the U.S. Constitution? Why or why not?

Answer:

This question requests a critique of a particular legal issue that has and will likely continue to come before me as a judge for analysis and application in individual cases before the court. The Wisconsin Code of Judicial Conduct prohibits judges and candidates for judicial office from engaging in extra-judicial commentary with respect to particular cases or legal issues that would appear to commit the judge in advance or suggest a promise or commitment of a certain course of conduct in office regarding particular cases or legal issues. See WI Supreme Court Rule 60.06(3). This ethics rule is binding upon me as a Wisconsin judge and candidate for appointed judicial office.

6. You have been on the Board of Advisors of the Federalist Society's Milwaukee chapter for the past 7 years.

A. The Federalist Society's mission statement contains the following assertion: "Law schools and the legal profession are currently strongly dominated by a form of

orthodox liberal ideology which advocates a centralized and uniform society." Do you agree with this statement? Please explain.

Answer:

The legal profession in America is large and increasingly diverse, encompassing a wide variety of educational and economic backgrounds, gender, race and ethnicity, and political and ideological viewpoints. The law schools and bar associations reflect this diversity, some to a lesser or greater extent than others. Like everything else in our society, some law schools and bar associations tend to be dominated by like-minded members who advocate a particular political ideology, while others are characterized by greater diversity of opinion.

B. Do you believe that the Warren Court went too far in creating rights and remedies in the U.S. Constitution? Please explain.

Answer:

This question, while very broad, calls for a critique of the precedents of the Warren Court. As noted in my responses to Questions 3-5, above, the Wisconsin Code of Judicial Conduct prohibits judges from engaging in extra-judicial commentary with respect to particular cases or legal issues that would appear to commit the judge in advance or suggest a promise or commitment of a certain course of conduct in office regarding particular cases or legal issues. See WI Supreme Court Rule 60.06(3). This ethics rule is binding upon me as a Wisconsin judge and candidate for appointed judicial office. As a general matter, however, to the extent they remain binding precedent, I will follow the opinions of the Warren Court, as I would all decisions of the United States Supreme Court.

7. In a speech you made last year to several Federalist Society chapters, before you were nominated to the 7th Circuit, you lambasted the federal judicial nomination process which, in your words, "has in the case of some nominees pretty much deteriorated into a raw exercise of power politics." You went on to state: "Special interest coalitions argue that judicial nominees should be expected to pass ideological litmus tests; they distort records and attack reputations in order to defeat some nominees."

A. Please explain what you meant by saying that the federal judicial nomination process has "in the case of some nominees pretty much deteriorated into a raw exercise of power politics."

Answer:

Some federal judicial nominees during the past decade or so have languished for many months or years without a committee or floor vote in the United States Senate. When this occurs, it often appears to be the result of a political power struggle. This phenomenon has been bipartisan and widely criticized for its detrimental effect on the process of judicial selection and the administration of justice. The criticism has come from both the left and the right, and the critics include the President, the Chief Justice of the United States Supreme Court, members of the United States Senate (of both political parties), the media, and many others.

B. Who are the nominees you had in mind?

Answer:

I had in mind any judicial nominee nominated by a President of either party, who has been denied a committee or floor vote after a reasonable period of time for evaluation of the nominee's record and qualifications.

C. As for your statement – "Special interest coalitions argue that judicial nominees should be expected to pass ideological litmus tests; they distort records and attack reputations in order to defeat some nominees" – to which coalitions were you referring? In your view, what are their ideological litmus tests? Whose records have they distorted? Whose reputations have they attacked? Please provide specific information.

Answer:

Ideological "litmus tests" are attempts to extract from judges or candidates for judicial office commitments or statements that appear to commit the judge or candidate on particular cases or legal issues. This approach to evaluating judicial candidates is practiced by a variety of organizations and special interests. It is antithetical to an independent judiciary. Any "litmus test" approach to judicial selection misunderstands the nature and role of the judiciary, which is to decide individual cases impartially, according to the law and the facts of each case, without prejudgment. This impartiality is compromised if the selection or confirmation process includes the expectation that a candidate for judicial office formulate positions on particular cases or legal issues in response to "litmus test" questions from any source.

As noted, a variety of organizations and special interests, to varying degrees, distort records and attack reputations in order to defeat some judicial nominees. For example, in my own case, an organization known as the "Alliance for Justice" has issued a report attacking my reputation by suggesting that I could not be a fair

and impartial judge——a serious attack in any case, but especially serious in the case of a sitting judge who has taken an oath to administer justice fairly and impartially. This phenomenon, which has increased in recent years, threatens the integrity of the confirmation process and the independence of the judiciary. The speech from which this question quotes was intended to highlight these problems to the extent they exist in judicial elections and judicial appointment processes.

8. Justice Sykes, you accepted approximately $8,000 of contributions from the state Republican Party in your 2000 reelection campaign. A former Chief Justice of the Wisconsin Supreme Court called this "a real mistake" and "a serious breach of ethics." Moreover, a Comment in Chapter 60 of the Wisconsin Code of Judicial Conduct states that "a judge must avoid any conduct which associates him or her with any political party."

A. Doesn't your acceptance of contributions from the Republican Party violate the spirit of the Wisconsin Code of Judicial Conduct? Please explain.

Answer:

No. These in-kind contributions violated neither the letter nor the spirit of the Wisconsin Code of Judicial Conduct. Former Wisconsin Chief Justice Nathan Heffernan formally retracted the statement referred to above, acknowledged that he had made it without first consulting the Code and that he was mistaken, and personally apologized to me for having made the serious error of publicly accusing me of a breach of ethics.

In fact, the Wisconsin Code of Judicial Conduct prohibits only political party membership and participation in a political party's "affairs, caucuses, promotions, platforms, endorsements, conventions or activities." WI Supreme Court Rule 60.06(2). The Code also prohibits a judge from making or soliciting financial or other contributions *for* or *to* a political party or its candidates. Id. The Code does *not* prohibit a judge from receiving contributions *from* a partisan PAC, as long as the contributions are otherwise legal. Judges and judicial candidates in Wisconsin commonly receive endorsements from partisan political officeholders, and judges' election campaigns commonly receive contributions from partisan political PACs, as well as union and other PACs. Judges and judicial candidates commonly appear at partisan political gatherings to promote their own judicial candidacies. None of these activities is considered a violation of the letter or the spirit of the Code, as long as the judge or judicial candidate is promoting his or her own candidacy rather than promoting the political party's candidates or activities. Most judicial candidates in Wisconsin (myself included) make an effort to secure bipartisan support.

The *Wisconsin State Journal*, which originally published the article to which this question refers, published former Chief Justice Heffernan's retraction two days after the original story appeared (copy attached); in the retraction, he stated that he should not have implied that receipt of these contributions was a violation of the code of judicial ethics. He also stated, however, that in his opinion, receipt of these contributions violated the "spirit" of "a non-partisan judiciary." On this point Chief Justice Heffernan and I disagree. I do not view receipt of a contribution from a partisan PAC to violate the spirit of a non-partisan judiciary. My 2000 Supreme Court campaign, like many other judicial campaigns in Wisconsin, was characterized by bipartisan support from a variety of individuals and constituencies in the legal and political communities around the state; some of those individuals and constituencies expressed their support in the form of financial contributions. In no way did this transform my candidacy or campaign into a partisan one.

B. If confirmed, would you be willing to recuse yourself in all cases in which the Republican Party was a litigant? Why or why not?

Answer:

Recusal is considered on a case-by-case basis. If confirmed to the 7th Circuit, I would follow all applicable federal laws, including 28 U.S.C.§ 455 and the Code of Conduct for United States Judges in determining whether to recuse myself from a particular matter. As to the Republican Party in particular, my ability to be impartial notwithstanding the in-kind contribution was demonstrated in Jensen v. Elections Board, 2002 WI 13, 249 Wis. 2d 706, 639 N.W.2d 537; I wrote this *per curiam* opinion for a unanimous court, declining a request that the Wisconsin Supreme Court take jurisdiction in legislative redistricting following the 2000 census. The case was brought by Republicans in the state legislature, and was opposed by their Democratic counterparts, who had begun a separate redistricting lawsuit in federal court.

9. You were the trial court judge in a 1993 case involving two anti-abortion activists, Michael Scott and Jack Lightner, who were convicted of blocking a door to a Milwaukee abortion clinic. The protesters blocked the doorway by binding their legs with welded pipes to the front of a car; they were removed by firefighters with blowtorches. You sentenced the protesters to 60 days in prison with work-release privileges but not before praising their motives. You told the defendants: "I do respect you a great deal for having the courage of your convictions and for the ultimate goals that you sought to achieve by this conduct." You also stated: "As far as your character and history and background, obviously you possess fine characters" and are "exemplary citizens." And you told the defendants, "Your motivations were pure."

A. There are 3 factors that you considered in sentencing: (1) the nature of the offense, (2)

the character, history, and background of the defendants, and (3) the interests of the community. With respect to the second factor, you stated that the defendants had "fine characters" and were "exemplary citizens." According to press reports, one of the defendants in this case had been arrested 80 times in abortion protests, and the other had been arrested 20 times. Why did you believe that they possessed "fine characters" and were "exemplary citizens"?

Answer:

It is axiomatic under Wisconsin law that defendants have a right to be sentenced upon facts that are of record. McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). The press reports referenced in your question, and the arrests which the question attributes to the press reports, were not facts of record in the case; I was, to the best of my recollection, unaware of these reports. Even if I had been aware of the press reports, it would have been legally improper for me to consider them as they were outside the record in the case.

The case in question was a 1993 misdemeanor disorderly conduct prosecution of two individuals arising out of an abortion clinic protest. Most disorderly conduct prosecutions in Milwaukee County involve acts of domestic violence, bar fights, and the like, and defendants in misdemeanor court are often recidivists with recent criminal records for offenses such as battery, theft, prostitution, drunk driving, and so forth. At sentencing in this case, the prosecutor took the unusual step of standing silent, choosing not to make a sentence recommendation. The defense attorneys and the defendants urged a sentence of community service.

Judges are required under Wisconsin sentencing law to take into account mitigating and aggravating factors regarding the gravity of the offense, the character and background of the offender, and the interests of the community. McCleary, 49 Wis. 2d at 276. At the sentencing in this case, the facts of record about the defendants' backgrounds demonstrated that they were atypical misdemeanor defendants: they were generally law-abiding, educated, employed individuals with stable families, no drug or alcohol problems and no rehabilitative needs. Although one defendant had a couple of extremely old, minor convictions from the mid-1970s and a more recent disorderly conduct fine, this conduct was so remote and/or inconsequential as to not be relevant to that defendant's current status before the court. While both defendants admitted to active, continued involvement in anti-abortion protests, this was the first criminal conviction of this type for both defendants, and there was no evidence in the record of a history of arrests in connection with their protest activity. As I noted in my sentencing remarks, the offense was not committed out of any sort of self-interest, the defendants were not violent, assaultive or threatening, and they did not resist arrest

in the case. Accordingly, none of the usual criminal motivations or sentence aggravating factors was present.

As a result, both defendants stood before the court, based upon the facts of record, as exemplary citizens with fine characters, which I was required to note as a mitigating factor separate and apart from the seriously disruptive and disorderly conduct they engaged in at the abortion clinic. I took substantial note of the seriousness of the offense during my sentencing remarks, including the following: "the community has a right to expect that the public order and that legitimate businesses will not be disrupted and interfered with in a way that rises to criminal dimensions, and this would be true even where the people who are engaging in this kind of conduct are exercising their free speech rights and free assembly rights and are in pursuit of goals that are not in and of themselves illegal." And further: "The community obviously . . . has a strong interest in deterring this type of conduct both by you and by others." And further: "What especially concerns me about this case is . . . your willingness and expressed intention to go beyond mere peaceful picketing to clinic blockades and other types of more dramatic methods to stop abortions from taking place, and these methods over time have the potential to cause the community even more serious harm, and to the extent that it can, my sentence has to protect the community at least for an interim period from these kind of tactics."

The options for sentencing in the case included community service, a fine, probation——or up to 90 days in jail. Based upon a balance of the mitigating and aggravating factors, I sentenced the defendants to 60 days in jail, which represented two-thirds of the potential maximum jail sentence for this crime.

B. Please explain what you meant when you told the defendants that you had a great deal of respect for "the ultimate goals you sought to achieve by this conduct."

Answer:

The evidence in the case established that the goal the defendants sought to achieve by their protest was a reduction of the number of abortions in our community. As I noted in my sentencing remarks: "I think that people on both sides of the abortion issue would probably agree with you that reducing the number of abortions in this country is a desirable goal." It was that ultimate goal that I respected.

C. The *Milwaukee Journal Sentinel* wrote that you gave the defendants in this case "unusual leeway to argue that the social value of their protest outweighed their violation of the law." However, during your campaign for the Wisconsin Supreme Court, you stated that you were "a firm believer in personal responsibility and

individual accountability, and I'm well known for that." Why, in the case involving abortion protestors, did you give "unusual leeway" to the defendants?

Answer:

There was nothing "unusual" about my handling of this case, as later admitted by *The Milwaukee Journal*. The newspaper properly corrected the record in a retraction dated April 8, 1993, in which the editors noted that applicable law and a well-accepted jury instruction allowed the jury to take into consideration any social value or contribution to the public interest of the defendants' conduct in determining whether it constituted disorderly conduct. I have attached a copy of that retraction. The jury instruction is based upon Wisconsin case law involving disorderly conduct prosecutions in the context of political protests. See WI Jury Instructions——Criminal, 1900, n.4. The abortion protester case, therefore, was unusual only in the sense that there are not very many disorderly conduct prosecutions arising out of political protests. My handling of the case did not, therefore, represent "unusual leeway" to the defendants in this context.

10. You have written that "[t]he last thing the public wants or needs is a judge whose mind is made up before he or she has heard the case." Are there any issues about which you feel so strongly that your mind would already be made up before hearing a case dealing with that issue? Please explain.

Answer:

No. It is a judge's duty to decide each case on its own merits based upon the law and the facts.

11. Justice Sykes, other than the case involving the abortion protestors, you seem to be very hard on criminal defendants. According to the *Milwaukee Journal Sentinel*: "In her five years on the felony bench, Sykes developed a reputation as one of the heaviest sentencing judges in Milwaukee County in recent memory." According to the *Wisconsin State Journal*, you have admitted: "I have a reputation as a hanging judge, that's true."

During your 2000 campaign for the state Supreme Court, you ran radio ads saying that you were such a tough sentencer that defense lawyers tried to avoid your court. You also stated that a wing of a maximum-security prison was informally named after you at the Waupun, Wisconsin Correctional Institution. In an article published in the *Milwaukee Journal Sentinel* on March 30, 2000, five days before the date of the election, you were quoted as saying: "That's what the inmates used to say, which got back to me through my bailiff. I said that not with any bragging rights. I said that to demonstrate that I have a great deal of sentencing experience."

A. It does not seem plausible to me that you mentioned having a wing informally named after you at a maximum-security prison, merely to demonstrate that you have a great deal of sentencing experience. Rather, your statement seems to be an example of precisely what you said it was not: an act of bragging. Given the proximity of the article's publication to the date of your election, weren't you attempting to send the message to would-be voters that you were a tough sentencer, which was one of your central campaign themes?

Answer:

During my 7-year tenure as a Milwaukee County Circuit Court judge, I handled approximately 4,000 misdemeanor cases, 2,500 felony cases, and 650 large claims civil cases, and presided over approximately 200 jury trials. Six of my seven years as a trial court judge were spent in criminal court, almost five of those six years in felony court, including two years in violent crimes court, where I handled exclusively homicide, attempted homicide, sexual assault, child sexual assault, child sexual molestation, and sex predator cases. In the context of criminal sentencing, I emphasized personal responsibility, victims' rights, and community protection, in addition to the other factors required by Wisconsin sentencing law. Because of the high volume, serious crime, and frequent recidivism which characterized the caseload in Milwaukee County felony court, I imposed many hundreds of prison sentences, some of them very lengthy, including some "life-means-life" terms, as well as other prison terms of short or moderate duration. I also placed many defendants on probation.

With all respect, I have not described myself as a "hanging judge." The reference in this question to that particular phrase was a response to a reporter for the *Wisconsin State Journal*, who used the phrase to describe me; I merely acknowledged that reputation. The reference to the off-hand jailhouse remark that I had a "wing named after me at Waupun" was also raised by a reporter, this time from the *Milwaukee Journal Sentinel*. I did *not* raise this subject during the interview to send a political message. The remark was made during an organizational meeting of the Criminal Penalties Study Committee, a committee of judges and corrections experts with experience in criminal sentencing, which was embarked on the task of reclassifying the state criminal code and developing sentencing guidelines in light of Wisconsin's shift to truth-in-sentencing. I immediately regretted making the remark at the committee meeting, as it was clear it was misunderstood. I intended it only to illustrate that I had a great deal of sentencing experience; I should have simply reiterated the statistics referenced above, rather than refer to a second-hand remark from the county jail. As I told the *Journal Sentinel* reporter, it was not said with any "bragging rights," and I regretted saying it at all.

B. You ran radio ads saying that you were such a tough sentencer that defense lawyers tried to avoid your court. If you were confirmed to the 7th Circuit, would you recommend that defense lawyers avoid your court room there as well?

Answer:

No. My sentences were fair and consistent with the law and the public interest. All persons before the court are entitled to due process and impartial justice, and I scrupulously adhere to this principle in every case.

12. Justice Sykes, you seem to rule consistently against the rights of criminal defendants and in favor of law enforcement's right to use evidence. In *State v. Knapp*, you were the lone dissenter from the Wisconsin Supreme Court's decision to exclude evidence gained as the result of an interrogation that violated the defendant's Miranda rights. Have you ever dissented in a criminal case where the Wisconsin Supreme Court ruled for the government, other than in the case *State v. Oakley*? Please explain.

Answer:

In addition to State v. Oakley, 2001 WI 103, 245 Wis. 2d 447 (Sykes, J., dissenting)(unconstitutional encumbrance on defendant's procreation rights), see, John Doe Nos. 1-3 v. State, 2003 WI 30, 260 Wis. 2d 653 (Sykes, J., dissenting.) The John Doe case involved a special criminal investigative proceeding known in the Wisconsin statutes as a "John Doe," pursuant to which a judge presides over the taking of evidence and testimony, usually pursuant to subpoena requests from the district attorney. A John Doe is generally ex parte and secret. In this case the DA moved, without explanation, to disqualify the attorneys for certain of the witnesses/targets subpoenaed before the John Doe judge. The John Doe judge granted the motion, without explanation. There was a threshold issue in the case regarding the jurisdiction of the court of appeals to review the John Doe judge's order. In addition, there was a challenge to the authority of the John Doe judge to enter such an order, as well as a challenge to the procedure by which the John Doe judge did so in this case. I concluded in dissent that the John Doe judge's disqualification of counsel for the witnesses/targets was improper, as it was essentially ex parte and without explanation.

13. You were also the lone dissenter in the case, *State v. Carlson*, in which the Wisconsin Supreme Court ruled 6-1 to overturn a conviction and permit a new trial because one of the jurors did not speak or understand English. The juror, whose native language was Lao, received a questionnaire and checked "no" where the form asked if he could "understand the English language" to serve on the jury. Under Wisconsin law, the clerk was required to strike the juror from the jury pool. The evidence showed that the juror, Tony Vera, did not understand the trial

testimony or the jury discussion, and the judge was made aware of this. It was also established that the juror was unable to use English to describe his job or what he watched on television. The trial judge nonetheless allowed him to remain on the jury, and you were the only member of the Wisconsin Supreme Court to conclude that an error of this type was harmless.

A. When one of twelve jurors does not understand a trial, how could you view that to be a harmless error and not be willing to grant a new trial?

Answer:

There was competing evidence in State v. Carlson regarding the juror's English language competence. Some of the evidence established that the juror, Tony Vera, understood English: he had lived in the United States for almost 20 years; he had passed a citizenship test; he obtained a driver's license and a fishing license; he was gainfully employed in factory work; he went to the casino and played blackjack; he watched and understood television (especially football and the Discovery Channel); he ordered off the menu in English when he ate out at restaurants; and, perhaps most significantly, he testified appropriately without an interpreter at the postconviction hearing. State v. Carlson, 2003 WI 40, 261 Wis. 2d 97, 137, 661 N.W.2d 51 (Sykes, J., dissenting.) Other evidence, as this question notes, suggested that this juror had difficulty with the English language; some of this evidence, however, was statutorily incompetent and therefore inadmissible under Wisconsin's evidence code, an issue which the majority opinion did not address.

When there is competing evidence, it is the job of the trial court——not the appellate court——to evaluate and weigh it, and make findings of fact. The trial court did so in Carlson: the trial court judge listened to and evaluated the evidence, and entered detailed factual findings that the juror in question adequately understood English in order to participate fairly and impartially as a juror in the case.

Under well-established rules of appellate review, factual findings of the trial court are reviewed deferentially, and are not disturbed unless clearly erroneous, that is, factually unsupported. Id.. This rule is based in part on the fact that the trial court is in a superior position to evaluate the evidence, because he or she hears and observes the witnesses first-hand, while the appellate court reviews only a paper record. The majority in Carlson disregarded this deferential standard of review and substituted its own view of the facts for that of the trial court; it was this failure to follow the applicable legal standard that I objected to in my dissent. Id. at 129-131.

B. Where would you draw the line in cases like this? If two jurors said they could not

understand English, would that be harmless error? How many jurors would have to fail to understand English before a defendant's right to a jury trial is compromised?

Answer:

As noted above, the juror in Carlson was *not* unable to understand English. The trial court judge found as a fact that the juror in question adequately understood English in order to participate fairly and impartially in the trial.

14. As a trial court judge, in the case *State v. Fritz*, you denied the defendant's ineffective assistance of counsel claim when the defendant's own attorney advised him to lie on the witness stand. You were unanimously reversed. The Court of Appeals wrote that "the overwhelming weight of legal authority is unfortunately, as the State recognizes, to the contrary." Indeed, the Sixth Amendment of the Constitution guarantees the right to the effective assistance of counsel.

A. Why do you believe it does not constitute a valid ineffective assistance of counsel claim when a defendant's own attorney advises him to lie on the witness stand?

Answer:

My decision in State v. Fritz applied the test for Sixth Amendment ineffective assistance of counsel claims under Strickland v. Washington, 466 U.S. 668 (1984), which requires the defendant to demonstrate: 1) that his counsel's performance was constitutionally deficient; and 2) that his counsel's deficient performance prejudiced the defense. I noted in my decision that under the Strickland test, prejudice means "but for counsel's unprofessional errors, the result of the proceeding would have been different."

Applying Strickland, I concluded that Fritz's counsel's conduct "was grossly unethical and constituted deficient performance within the meaning of the Sixth Amendment." I also concluded, however, that Fritz had not been prejudiced, because the result of the trial would not have been different if Fritz had refrained from lying on the witness stand. That is, Fritz was convicted despite his perjury; the jury certainly would have convicted him in the absence of his perjury.

The court of appeals agreed with my conclusion that Fritz's counsel's performance was constitutionally deficient, but disagreed with my conclusion that it was not prejudicial. The court of appeals focused on the possibility that the defendant might have accepted a proffered plea bargain and received a lesser sentence had he not followed his counsel's advice to go to trial and lie on the witness stand. State v. Fritz, 212 Wis. 2d 284, 296-98, 569 N.W.2d 48 (Ct. App. 1997).

B. Do you concede that you made a mistake in this case?

Answer:

Yes.

SUPREME COURT
STATE OF WISCONSIN
P. O. BOX 1688
MADISON, WISCONSIN 53701

CHAMBERS OF
DIANE S. SYKES, JUSTICE

STATE CAPITOL, 16 EAST
(608) 266-1884

June 2, 2004

Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch:

Enclosed are my responses to Senator Durbin's supplemental questions regarding my nomination to the Seventh Circuit Court of Appeals.

Sincerely yours,

Diane S. Sykes
Justice

DSS:jd
Cc: Honorable Patrick J. Leahy
Attachment

Additional Questions of Senator Richard J. Durbin
to Justice Diane Sykes
Nominee for the Seventh Circuit Court of Appeals

April 5, 2004

1. You were the presiding judge in a 1993 abortion case involving the conviction of two anti-abortion activists, Michael Skott and Jack Lightner, who were convicted of disorderly conduct for cementing their legs to a car in order to block the door to a Milwaukee abortion clinic.

In a previous question I posed to you, I asked why you called the defendants convicted in this case "fine characters" and "exemplary citizens" at their February 9, 1993 sentencing in light of the fact that one defendant had been arrested 80 times in abortion protests and the other 20 times. Although a January 22, 1993 *Milwaukee Journal* article about the defendants' conviction reported that Mr. Skott had been arrested 80 times in abortion protests and his co-defendant Jack Lightner had been arrested 20 times, you have stated that you were unaware of the press reports. You also stated that, in any event, "there was no evidence in the record of a history of arrests in connection with their protest activity."

However, a sentencing statement filed with the Court on February 4, 1993 by one of the defendants, Michael Skott, indicates otherwise. Mr. Skott wrote: "Now it is your job as an elected representative of this county to sentence me, Judge Sykes. I have been in jail before for similar activities to the one in question before you today." At the sentencing hearing, held on February 9, 1993, you stated: "I have reviewed carefully the sentencing statement by Mr. Skott."

Additionally, the Assistant District Attorney stated at the sentencing hearing: "Here there is no evidence that these defendants have made any effort to conform their conduct to the requirements of law. Instead, both have been charged since this case has been pending with additional criminal violations." The prosecutor also stated that "Mr. Skott has also engaged in conduct which has precipitated his arrest and subsequent criminal charging under the same – purview of the same issue," and "I understand and I know that he [Skott] has been many times found guilty in municipal court and has on occasion served time in the House of Correction for his failure to pay fines on commitments."

A. How do you reconcile your statement that "there was no evidence in the record of a history of arrests in connection with their protest activity" with Mr. Skott's statement that "I have been in jail before for similar activities to the one in question before you today"?

See below.

B. How do you reconcile your statement that "there was no evidence in the record of a history of arrests in connection with their protest activity" with the Assistant District Attorney's statement that "Here there is no evidence that these defendants have made any effort to conform their conduct to the requirements of law. Instead, both have been charged since this case has been pending with additional criminal violations"?

See below.

C. How do you reconcile your statement that "there was no evidence in the record of a history of arrests in connection with their protest activity" with the Assistant District Attorney's statement that "Mr. Skott has also engaged in conduct which has precipitated his arrest and subsequent criminal charging under the same – purview of the same issue"?

See below.

D. How do you reconcile your statement that "there was no evidence in the record of a history of arrests in connection with their protest activity" with the Assistant District Attorney's statement that "I understand and I know that he [Skott] has been many times found guilty in municipal court and has on occasion served time in the House of Correction for his failure to pay fines on commitments"?

Answer:

In misdemeanor sentencing hearings in Milwaukee County Circuit Court during this time period, the prosecutor would typically advise the court of a defendant's prior criminal history as a part of the State's sentencing argument and recommendation. Unlike today, there were no computers on the bench and judges relied upon the prosecutor to present evidence of a defendant's prior criminal record at sentencing. Newspaper articles are outside the record and therefore not a proper source of sentencing information. A prior criminal record is an aggravating factor for sentencing purposes, and the lack of a prior criminal record is generally considered to be a mitigating factor. As I indicated in my earlier responses, the prosecutor in this case took the unusual step of standing silent at sentencing, making no record of the defendants' history in this regard and making no sentencing recommendation on behalf of the State.

After the defense attorneys made their sentencing arguments, the prosecutor belatedly requested an opportunity to address the court, which was granted. She stated, "I can inform the court I have no knowledge of Mr. Skott having any prior criminal conviction. I may be incorrect. I understand and know that he has been many times found guilty in municipal court and has on

occasion served time in the House of Correction for his failure to pay fines on commitments. However, I am not aware of any criminal convictions. I see he's shaking his head no, so that's a correct statement." The prosecutor then noted that the other defendant, Mr. Lightner, had been convicted of two offenses nearly twenty years before (which, as I indicated in my earlier responses, was too remote and insignificant to the conduct before the court to have much bearing upon sentencing), and had more recently been fined for disorderly conduct (circumstances unspecified.) The prosecutor did not mention any history of municipal citations for protest activity on the part of Mr. Lightner. In his written sentencing statement Mr. Skott indicated only very generally that he had been in jail for his protest activities; as indicated above, he confirmed that the case before the court constituted his first criminal conviction.

I concluded from this very generalized record information that Mr. Skott's prior protest activity had generated only municipal citations rather than criminal arrests and charges. Municipal court in Milwaukee handles only local ordinance matters——traffic tickets and citations for ordinance violations punishable by civil forfeiture——not state crimes. Municipal violations are non-criminal and do not ordinarily involve arrests. Rather, they usually involve the issuance of a ticket or citation, which requires the defendant's appearance in municipal court or payment of a forfeiture in lieu of appearing in court. Occasionally, when a municipal forfeiture is imposed and remains unpaid, the defaulting defendant may be ordered to serve a few days in jail on a "commitment" for nonpayment of the forfeiture. The matter remains civil in nature. Accordingly, having been found guilty in municipal court and having served time in jail on municipal "commitments" does not equate in our system to a having a history of arrests or criminal convictions. As I have previously noted, the arrest histories mentioned in the newspaper article were not part of the sentencing record before the court.

The prosecutor in this case also made a generalized statement about a new charge that apparently had been issued against the defendants for protest-related conduct that occurred after the case then before the court had been charged. I did not construe this as a constituting a history of arrests, although the record reflects that I certainly took it into consideration for sentencing purposes, together with the information about the municipal court matters and the other relevant facts in the record. In my sentencing remarks I noted that the defendants "obviously have a history of this kind of behavior . . . and I need to take that into consideration." I also stated that "rehabilitation in the conventional sense in this case is unlikely to occur. I suppose it is possible that you would learn a lesson from this case and not continue in these activities if you view the trial as I do, and that is as a

rejection by the community of these kinds of tactics." I concluded that "[b]ased on the record, however, and based on what I've heard of your intentions, I don't have a great deal of confidence that you will take that message to heart, and my sentence has to reflect that fact." As I indicated in my earlier responses, I imposed a sentence of 60 days in jail, two-thirds of the available maximum. In light of the record evidence regarding the seriousness of the offense, the defendants' character and backgrounds, and the interests of the community, this sentence was neither too harsh nor unduly lenient.

The trial and sentencing hearing in this case took place more than 11 years ago. My responses to these and your earlier questions are based primarily on my review of the pertinent parts of the case file, most notably the transcript of the sentencing hearing, a copy of which is enclosed. I have a generalized independent recollection of this case, but have relied on the enclosed transcript for the details, and have attempted to place those details in the context of the law and general sentencing practices in Wisconsin.

2. In his sentencing statement, Mr. Skott equated abortion with the Holocaust and slavery, and he called abortion clinics "death camps" where "a hired killer contracts out to end what has been labeled a problem." At the sentencing hearing, you told Mr. Skott and his co-defendant that "obviously you possess fine characters," "you have otherwise been exemplary citizens," "your motivations were pure," and "I do respect you a great deal for having the courage of your convictions and for the ultimate goals that you sought to achieve by this conduct." Can you understand why some people would view your favorable comments about the defendants as a validation of their beliefs?

Answer:

I do not believe that my sentencing remarks, when read in their entirety and not out of context, could be considered a "validation" of the defendants' beliefs or rhetoric. My more favorable remarks about the defendants' "motivations," "courage of conviction" and "character" were not directed at the validity of their beliefs, but, rather, represented the legally-required evaluation of the defendants' character and motivations to determine whether any of the usual aggravating criminal motivations or background factors were present in the case. Also, my favorable comment about the goal the defendants sought to achieve was a reference to their underlying goal of reducing the number of abortions, as is clear from the following statement from my sentencing remarks: "I think that people on both sides of the abortion issue would probably agree with you that reducing the number of abortions in this country is a desirable goal." My sentencing remarks also reflect extensive consideration of the seriousness of the offense and criticism of the defendants' conduct and tactics, as I

have previously discussed. My sentencing remarks were fair and even-handed, and the 60-day jail sentence I imposed, at two-thirds of the maximum, could not be characterized as unduly lenient or a "validation" of the defendants' beliefs.

3. In my previous set of questions to you, I asked about your views on the right to privacy, the Warren Court era, *Roe v. Wade, Griswold v. Connecticut,* and *Miranda v. Arizona* in questions 3, 4, 5, and 6B. You declined to provide answers to each of these questions and stated:

> This question requests a critique of certain United States Supreme Court cases that I am or will be required to interpret and apply as a judge in individual cases before the court. The Wisconsin Code of Judicial Conduct prohibits judges from engaging in extra-judicial commentary with respect to particular cases or legal issues that would appear to commit the judge in advance or suggest a promise or commitment of a certain course of conduct in office regarding particular cases or legal issues.

As you know, judicial ethics expert and professor Steven Lubet disagrees with your interpretation of the Wisconsin Code of Judicial Conduct. You are being considered for a lifetime appointment to the U.S. Circuit Court of Appeals for the Seventh Circuit, and my role as a member of the Senate Judiciary Committee and of the United States Senate is to consider your record and your views as part of the Advice and Consent process. Please provide responses to questions 3, 4, 5, and 6B.

Answer:

With respect, your previous questions asked me to provide a political/legal critique of certain precedents of the United States Supreme Court——cases that I am or likely will be required to interpret and apply as a judge in individual cases before the court. Wisconsin Supreme Court Rule 60.06(3) prohibits judges and candidates for judicial office from engaging in extra-judicial commentary that would commit or appear to commit the judge to a position or course of conduct in office regarding particular cases or legal issues. Engaging in extra-judicial commentary that commits or appears to commit the judge to a position on cases or legal issues threatens to compromise the impartiality that the judge is required by oath and due process to bring to each case.

I do not know Professor Lubet's level of familiarity with the Wisconsin Code of Judicial Conduct or his level of familiarity with my position in this regard, which I have stated more completely in "Ethics and Rhetoric in Wisconsin Judicial Elections," *Wisconsin Interest*, Vol. 9, No. 2, Summer 2000, a copy of which was earlier provided to the Judiciary Committee. There is a range of opinion in the legal

academy and the judiciary regarding the scope of so-called "commitments" clauses in judicial ethics codes. To the extent that Professor Lubet and I disagree, I must keep my own counsel and abide by my interpretation of the obligations of my oath, the duties of my office, and the requirements of the Code, which are binding on me.

4. In your written response to question 7C, you wrote that "an organization known as the 'Alliance for Justice' has issued a report attacking my reputation by suggesting that I could not be a fair and impartial judge – a serious attack in any case, but especially serious in the case of a sitting judge who has taken an oath to administer justice fairly and impartially."

The Alliance for Justice is an organization that consists of over 60 members, including the Asian American Legal Defense and Education Fund, Business and Professional People for the Public Interest (based in Chicago), the Center for Reproductive Rights, the Disability Rights Education and Defense Fund, the Human Rights Campaign, the Lawyers' Committee for Civil Rights Under Law, the Mexican American Legal Defense and Educational Fund, the National Association of Criminal Defense Lawyers, NARAL Pro-Choice America, the National Employment Lawyers Association, the NOW Legal Defense and Education Fund, Planned Parenthood Federation of America, and the Wilderness Society.

Many of these organizations engage in frequent litigation or amicus participation in federal appellate courts. If confirmed, would you be willing to recuse yourself in all cases in which the Alliance for Justice, or one of its members, is a litigant? Why or why not?

Answer:

Recusal is considered on a case-by-case basis. If confirmed to the 7th Circuit, I would follow all applicable federal laws, including 28 U.S.C. § 455 and the Code of Conduct for United States Judges, in determining whether to recuse myself from a particular matter.

LANE
POWELL
SPEARS
LUBERSKY
LLP

James L. Robart
206-223-7031
robartj@lanepowell.com

March 1, 2004

Law Offices

A Limited Liability Partnership Including Professional Corporations

1420 Fifth Ave. Suite 4100 Seattle, WA 98101-2338

206.223.7000

Facsimile: 206.223.7107

Website: www.lanepowell.com

The Honorable Orrin G. Hatch
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: ***Responses to Follow-up Questions***

Dear Senator Hatch:

Enclosed please find Responses to the Written Follow-up Questions of Senator Richard J. Durbin in connection with my nomination to the United States District Court for the Western District of Washington.

Thank you for your attention to this matter.

Very truly yours,

James L. Robart

JLR:dmw
Enclosure

cc (w/enc): The Honorable Patrick J. Leahy

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Responses of James L. Robart to the Written Follow-up Questions of Senator Richard J. Durbin

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

   Response: Yes. I met with a staff person from the Senate Judiciary Committee. No, or not applicable, as to the remainder of the questions.

2. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: **Yes. I met with staff members from the Department of Justice. No, or not applicable, as to the remainder of the questions.**

3. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House? If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: **Yes. I met with a staff member from the White House. No, or not applicable, as to the remainder of the questions.**

4. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, did any of these individuals, groups, or organizations share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: **No such meetings and no such documents.**

COURT OF COMMON PLEAS
15TH JUDICIAL DISTRICT OF PENNSYLVANIA
2 N. HIGH STREET, SUITE 230
P. O. BOX 2748
WEST CHESTER, PENNSYLVANIA 19380-0991

JUAN R. SÁNCHEZ
JUDGE

TELEPHONE: (610) 344-6184

March 2, 2004

Senator Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Responses to Senator Richard J. Durbin's Written Follow-Up Questions

Dear Senator Hatch:

Enclosed please find responses to Senator Durbin's written follow-up questions. Should you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,

Juan R. Sánchez
J.

JRS:mfd
enc.
cc: Senator Patrick J. Leahy
Ranking Democratic Member
United States Senate
Washington, DC 20510

Responses of Juan R. Sánchez to the Written Follow-up Questions of Senator Richard J. Durbin

You may be aware from press accounts that the Senate Sergeant at Arms is currently conducting an investigation of the Senate Committee on the Judiciary and the wide-scale incidents of theft of memorandums and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant-At-Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years.

Additionally, at least one of the alleged perpetrators, a former Republican staff member on the Judiciary Committee, has publicly admitted that many of the documents he stole and/or read related to judicial nominations. The former staff member was one of many Republican staff members who worked on judicial nominations matters for Committee Chairman Hatch and subsequently for Majority Leader Frist.

Because of your current status before the Judiciary Committee, I would like to ask you a series of questions concerning these unfortunate criminal incidents.

1. In preparation for your confirmation hearing before the Senate Judiciary Committee, **(a)** did you meet with any staff of the Senate Judiciary Committee? If so, during those meetings, **(b)** did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? **(c)** Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? If so, **(d)** please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: Question 1(a) No. I did not meet with any Senate Judiciary Committee staff member in order to prepare for my confirmation hearing. Question 1(b) Not applicable. Question 1(c) No. The Senate Judiciary Committee staff did not provide me with any documents or excerpts from documents that appeared to me to have been drafted or prepared by Democratic staff. Question 1(d) Not applicable.

2. In preparation for your confirmation hearing before the Senate Judiciary Committee, **(a)** did you meet with any staff of the U.S. Department of Justice? If so, during those meetings, **(b)** did any staff of the Justice Department share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? **(c)** Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? **(d)** If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: Question 2(a) Yes. In preparation for my Senate Judiciary Committee hearing I met with several members of the United States Department of Justice. Question 2(b) No. The Department of Justice Staff did not share, reference or provide me with any information whatsoever derived from Democratic sources. Question 2(c) No. No documents or excerpts from documents appearing to be prepared by Democratic sources or staff were ever provided to me by the Department of Justice staff in preparation for the Senate Judiciary Committee hearing. Question 2(d) Not applicable given my responses to questions 2(a) through 2(c).

3. In preparation for your confirmation hearing before the Senate Judiciary Committee, **(a)** did you meet with any staff of the White House? If so, during those meetings, **(b)** did any staff of the White House share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? **(c)** Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? **(d)** If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: Question 3(a) Yes. I did meet with several White House staff members to prepare for the Senate Judiciary hearing held February 11, 2004. Question 3(b) No. The White House staff members I met with never shared, referenced or ever provided me with any information obtained or derived from Democratic sources. Question 3(c) No. No documents or excerpts from any document or documents prepared by, or appearing to be prepared by Democratic sources were ever provided to me by the White House staff I met with in preparation for the Senate Judiciary Committee hearing. Question 3(d) is not applicable given my responses to questions 3(a) through 3(c).

4. In preparation for your confirmation hearing before the Senate Judiciary Committee, **(a)** did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees? If so, during those meetings, **(b)** did any of these individuals, groups, or organizations share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources? **(c)** Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff? **(d)** If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Response: Question 4(a) No. I have never met with anyone associated with individuals, groups or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President Bush's judicial nominees. Question 4(b) Not Applicable. Question 4(c) No. No individuals, groups, or organizations provided me any documents or excerpts from documents that appeared to me to have been drafted or prepared by Democratic staff. Question 4(d) Not applicable.

SUBMISSIONS FOR THE RECORD



News From:
U.S. Senator
Russ Feingold

506 Hart Senate Office Building
Washington, D.C. 20510-4904
(202) 224-5323

http://www.senate.gov/~feingold

Contact: Trevor Miller
(202) 224-8657

Statement of U.S. Senator Russ Feingold
At the Senate Judiciary Committee Hearing on the Nomination of Diane Sykes

February 11, 2004

Mr. Chairman, it is my privilege to welcome Justice Diane Sykes to this hearing and to introduce her to the Committee. Justice Sykes is a true product of Wisconsin. She was born in Milwaukee and attended Brown Deer High School. She left our state to go to college at Northwestern University, but she returned to work as a reporter for the Milwaukee Journal and then to attend Marquette University Law School, where she was a member of the law review. After law school, she clerked for Judge Terry Evans, then a U.S. District Judge for the Eastern District of Wisconsin. If Justice Sykes is confirmed to the Seventh Circuit, Judge Evans will be her colleague on that court.

After clerking, Justice Sykes practiced law for seven years with the Milwaukee firm of Whyte & Hirschboeck. In 1992, she was elected to a circuit court judgeship in Milwaukee County. In September 1999, then Governor Tommy Thompson named her to a vacancy on the Wisconsin Supreme Court. She was reelected in the year 2000, and she continues to serve on the highest court in our state.

Mr. Chairman, I think it is important to note that Justice Sykes' nomination is the result of a collaborative bipartisan process of judicial selection in our state. The Wisconsin Federal Nominating Commission was first formed nearly a quarter-century ago by former Senators William Proxmire and Gaylord Nelson. It has been used continuously since then by Democratic and Republican Senators under both Democratic and Republican Presidents.

The Wisconsin Federal Nominating Commission is an independent panel selected by Wisconsin elected officials and the State Bar of Wisconsin. The Commission charter provides that it will review applications for federal District Court and Court of Appeals vacancies in Wisconsin, as well as United States Attorney vacancies. Senator Kohl and I have worked very hard to maintain and strengthen the Commission throughout our time in

the Senate. The composition of the Commission assures that selections for these important positions will be made based on merit, not politics. Over the past 25 years, the Commission process has yielded very high-quality nominees and has served to de-politicize the nomination process in our state.

Despite some initial resistance, the Bush Administration ultimately agreed to have candidates for this Seventh Circuit vacancy go through the Commission process. Under the joint leadership of Dean Joseph Kearny of the Marquette University Law School and Professor Frank Turkheimer of the University of Wisconsin Law School, the Commission worked extremely hard under a very tight deadline. It recommended four highly qualified candidates, including Justice Sykes. Senator Kohl and I, working with Rep. Sensenbrenner, the senior Republican officeholder in the state, decided to forward all four names to the White House, and the President selected Justice Sykes from the four.

I have always maintained that with cooperation and consultation between the President and home state Senators, the judicial nomination process can be far less contentious and, frankly, far less frustrating, than it has been over the past several years. Recognizing that ideological differences are inevitable in this process as control in the Senate and in the White House change hands, it would serve those who choose and confirm federal judicial nominees well to follow the example of the Wisconsin Federal Nominating Commission.

I met with Justice Sykes last summer as part of the Commission process. I had a chance to question her closely about her background, her qualifications, and her judicial philosophy. There are a number of topics on which we do not see eye to eye, but I found Justice Sykes to be candid and forthcoming and I believe she is well qualified to fill this seat on the Seventh Circuit. I have great respect for Justice Sykes' commitment to public service. Talented young lawyers have many more remunerative options that they can pursue. I also have great respect for the Commission process. I fully support Justice Sykes' nomination.

Mr. Chairman, it is my hope that the work of the Wisconsin Federal Nominating Commission, the nomination of Justice Sykes, and her smooth confirmation will send a signal to the White House, to my colleagues on both sides of the aisle, and to the country, that we can, in fact, work together in a bipartisan way to fill judicial vacancies.

I want to again welcome Justice Sykes to the Committee, and I look forward to her taking the federal bench. Thank you Mr. Chairman.

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JAN-30-2004 12:54 FROM:DANE COURTS RM 319 608 267 4151 TO:2022285797 P.002/003

Judge Patrick J. Fiedler
DANE COUNTY CIRCUIT COURT, BRANCH 8
210 Martin Luther King Jr. Blvd., Room 316
Madison, Wisconsin 53709

Telephone: (608) 266-4325

Tammi Ytri, Clerk
Marian Gosa, Secretary

Facsimile: (608) 267-4151
Teri Goeckwehr,
Court Reporter

January 30, 2004

Sent by Facsimile and U.S. Mail

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Diane S. Sykes

Dear Mr. Chairman:

I write in support of the appointment of Diane S. Sykes to the United States Circuit Court of Appeals for the Seventh Circuit. I support her nomination enthusiastically and without reservation.

First, some brief information about myself. I was appointed by President Ronald Reagan and served as the United States Attorney for the Western District of Wisconsin from August 1987 to January 1991. Since November of 1993, I have served as a circuit judge in Dane County, Wisconsin.

I've known Justice Sykes since 1993. During that time period, I have witnessed first-hand her qualities as a jurist and her character as a person. In my opinion, Diane Sykes is extremely well qualified for this position.

Over the years, Diane and I have had frequent contacts as judges. Diane has been a circuit judge in Milwaukee County for over seven years and has been a justice on the Wisconsin Supreme Court since 1999. Diane is well-prepared, organized, intelligent and compassionate. Her rulings are based on the law and arrived at by being process-oriented, not result-oriented. She is eminently fair.

Diane has been actively involved in her community and, most importantly, with her family. She has been able to maintain very high standards as a jurist while still fulfilling the role of being a "soccer mom" with her sons Jay and Alex.

Frankly, Diane's qualities make this a very easy letter to write. Diane Sykes would be an outstanding judge on the Seventh Circuit. I respectfully request that you give her appointment every consideration. Thank you.

Very truly yours,

Patrick J. Fiedler, Judge
Circuit Court Branch 8

PJF/meg
cc:
The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, D.C. 20510

U.S. Department of Justice
Office of Legal Policy
Room 4234 Main Justice Building
950 Pennsylvania Av N.W.
Washington, D.C. 20530-0001

News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

February 11, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the Nominations of

DIANE S. SYKES TO BE
U.S. CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT;

JAMES L. ROBART TO BE
U.S. DISTRICT JUDGE, WESTERN DISTRICT OF WASHINGTON; AND

JUAN R. SANCHEZ TO BE
U.S. DISTRICT JUDGE, EASTERN DISTRICT OF PENNSYLVANIA

I am pleased to welcome to the Committee this afternoon three outstanding nominees, one for the federal appeals court bench and two for the district court bench. Let me say just a few words about each nominee before turning to the ranking member and their home state senators.

Our nominee to the Seventh Circuit Court of Appeals, **Justice Diane S. Sykes**, is well prepared to join the federal bench. A graduate of Marquette University School of Law, Justice Sykes served as a law clerk to the Honorable Terrence T. Evans in the Eastern District of Wisconsin. As a litigator in private practice, she specialized in civil litigation in state and federal court.

Justice Sykes served on the Milwaukee County Circuit Court from 1992 to 1999, when she was appointed by Governor Tommy Thompson to fill a mid-term vacancy on the Wisconsin Supreme Court. She won election for a ten-year term on the court in 2000 with 65% of the vote. We welcome Justice Sykes to this afternoon's hearing, and we look forward to hearing from her.

James L. Robart, who has been nominated to the Western District of Pennsylvania, has exceptional qualifications for the federal bench. After graduating from Georgetown University Law Center, he joined the law firm of Lane, Powell, Moss & Miller. Mr. Robart became a partner in that firm in 1980, and subsequently became the Co-Managing Partner and later the sole Managing Partner—a position that he holds today. During his time at the firm, Mr. Robart has specialized in complex commercial litigation, and he brings a wealth of trial experience to the federal bench. We're pleased to have him here today.

Judge Juan R. Sanchez, our nominee to the Eastern District of Pennsylvania, has an admirable record as a public servant and is a great choice for the federal bench. A graduate of the University of Pennsylvania Law School, he began his career as a Staff Attorney for Legal Aid of Chester County, Pennsylvania. Two years later he joined the Chester County Public Defender's Office as a Senior Trial Attorney—a position that he retained until 1997. During that same period, Judge Sanchez worked for two law firms and as a sole practitioner, representing Spanish-speaking individuals in a wide variety of legal areas. In 1998, Judge Sanchez joined the Court of Common Pleas in the 15th Judicial District of Pennsylvania, where he serves today. We are honored to have him at today's hearing.

I look forward to hearing from all of our nominees, and I thank them for appearing before the committee today.

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U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee,
On The Nomination Of Diane Sykes
To The United States Court of Appeals For The Seventh Circuit
February 11, 2004

Today, just three business days since our last judicial nominations hearing and only two days after we finally gained access to our offices here in the Dirksen building because of the ricin scare, the Committee is holding yet another judicial nominations hearing. This is the fourth judicial nominations hearing already this year and matches the total number of hearings for circuit court nominees during all 52 weeks of 1996. Traditionally, the number of nominees who have received hearings and who are considered in a presidential election year has been lower than in other years. Indeed, in 1996, not a single one of President Clinton's circuit court nominees was confirmed by the Republican-controlled Senate.

I doubt that the Senate's current Republican majority will repeat the pattern they followed in 1996, now that there is a Republican in the White House. In fact, the pace they have set already shows that this Committee continues to operate in overdrive in the quest to confirm President George W. Bush's judicial nominees as rapidly as possible. That is a double standard that ill serves the Senate, the courts and the country.

The hearing today is proceeding in the midst of a continuing investigation into the theft of perhaps thousands of Democratic staff memos by Republican staff on this Committee. It has come to light that Republican staffers spied and stole internal, confidential drafts and memos of their Democratic counterparts and then exploited their own misconduct bring dishonor to this Committee and the Senate. I do not intend to comment further today on what may well be criminal misconduct. Taking things that do not belong to you is wrong. There should be no excusing it.

I have concerns that this hearing is proceeding today while we are in the midst of this ongoing investigation. It also undercuts the Committee's critical role in reviewing these lifetime appointees to rush forward with a hearing a mere two days after our staff has been permitted to re-enter this building. Notice of this hearing was given while we were locked out of our buildings – with no access to our computers or our papers. The Senate's constitutional duties with regard to judicial nominations require that we be given adequate time to prepare for each nomination that comes before this Committee. We have confirmed 171 of President Bush's nominees thus far – including 30 to the Courts of Appeals. We have and continue to work hard on this President's judicial nominations.

senator_leahy@leahy.senate.gov
http://leahy.senate.gov/

The Committee today begins consideration of the nomination of Justice Diane Sykes to a seat on the U.S. Court of Appeals for the Seventh Circuit. Justice Sykes comes before us with the support of Senator Kohl and Senator Feingold. She also comes before us with a judicial record – both at the trial court level and with the Supreme Court of her home State of Wisconsin, which we are reviewing.

In a speech delivered to the Federalist Society last year, Justice Sykes expressed concerns about the "politicization of the judiciary, both at the federal and state level." I have similar concerns, particularly with regard to far too many of this President's divisive judicial nominees.

We will also hear today from Judge Juan Sanchez, nominated to the U.S. District Court for the Eastern District of Pennsylvania. He will be the sixteenth nominee of President Bush's to the U.S. district courts in Pennsylvania who is being given a hearing. While I was Chairman, the Senate held hearings for and confirmed 10 Bush nominees to the district courts in Pennsylvania. There is no State in the Union that has had more federal judicial nominees of this President confirmed by this Senate than Pennsylvania, despite the fact that Republicans blocked the nominations of 10 judicial nominees of President Clinton from Pennsylvania, along with more than 50 others.

I also want to comment briefly on the nomination of James Robart to the U.S. District Court for the Western District of Washington. This nomination from Washington State has the support of both home-state Senators. Senator Murray and Senator Cantwell have both worked hard to establish a bipartisan process for making recommendations to the President for federal judicial vacancies in their state. They are to be commended for their work. Mr. Robart is the fourth Washington State nominee who is a product of Washington's bipartisan selection commission, and he appears to be another well-qualified nominee. This shows what can be achieved if the Administration would work with us.

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WISCONSIN COURT OF APPEALS
DISTRICT IV
TEN EAST DOTY STREET, SUITE 700
MADISON, WISCONSIN 53703-3397

PAUL LUNDSTEN, JUDGE

Telephone: (608) 266-9361
FAX: (608) 267-0432

January 30, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Justice Diane Sykes is a superb jurist. It is with great pleasure that I write to support her nomination. I have much experience, both as an appellate lawyer with the Wisconsin Department of Justice and as an appellate court judge on Wisconsin's middle level court. These vantage points formed an optimal position from which to assess Justice Sykes's abilities.

During Justice Sykes's tenure on the Wisconsin Supreme Court, I have repeatedly needed to closely scrutinize her opinions. I can attest they are always clearly written, well reasoned, and well supported by authority. When in the minority, Justice Sykes disagrees without being disagreeable. She understands that appellate decisions are not law review articles, but rather decisions that affect real people and organizations. Perhaps drawing on her experience as a lawyer and trial judge, she writes opinions that lawyers and judges can use under real-world time pressures to make rulings, make arguments, and advise clients. Her blend of common sense and scholarship produces the right balance in her opinions, that is, clear holdings and the right amount of explanation.

I can also confirm that Justice Sykes was an exceptional trial judge. As an Assistant Attorney General for the State, I was called on to defend then Milwaukee Trial Court Judge Sykes's decisions against challenges by convicted felons. This was not difficult. In a job where time was in short supply, she consistently cut to the core with rulings that held up legally and showed her understanding of both the details of the law and the broader conceptual background. If only all trial judge decisions had been so on the mark and easy to defend.

I recommend Justice Diane Sykes for the position of federal appellate court judge with no reservations. Her confirmation would be an enormous loss for Wisconsin's judiciary, but a corresponding great gain at the federal level.

Sincerely yours,

Paul Lundsten
Judge, Wisconsin Court of Appeals

c: The Honorable Patrick J. Leahy
Office of Legal Policy

Statement
Sen. Rick Santorum
Senate Judiciary Committee

February 11, 2004

Mr. Chairman,

Thank you for the opportunity to speak on behalf of Judge Juan R. Sanchez's nomination by President Bush to the United States District Court, Eastern District of Pennsylvania. I want to thank the President for his nomination of this qualified candidate and to congratulate Judge Sanchez.

Judge Sanchez is a *cum laude* graduate of the City College of the City University of New York. He received his law degree from the University of Pennsylvania Law School in 1981. Since 1998, he has served as a judge on the Court of Common Pleas, 15th Judicial District of Pennsylvania in West Chester, PA.

Judge Sanchez brings to the bench wide ranging legal experience. He served as a staff attorney for Legal Aid of Chester County in West Chester, PA from 1981 to 1983. He had a general legal praetice and was a partner with Nester, Nester & Sanchez from 1983-1990. He was a Sole Practitioner from 1990-1997. Judge Sanchez also served as a senior trial attorney for the Chester County Public Defender's Office from 1983-1997. In 1997 he served as a trial attorney at MacElree, Harvey, Gallagher, Featherman & Sebastian. Judge Sanchez serves as a Adjunct Professor at West Chester University, Immaculata University, and Villanova University School of Law.

Judge Sanchez has served his community in numerous ways. He has served on the board of Centro Guayacan, a multi-cultural educational community center, Riverside Care of Chester County, Chester County Hospital, the YMCA of Central Chester County and the YMCA of Brandywine Valley, the Volunteer English Program in Chester County, and Community Volunteers in Medicine. He has also served as a commissioner for the Housing Authority of Chester County and as an advisor to the United Way of Chester County. He has received several awards for his service as a judge and his service to the community.

Again, I would like to commend the Committee for moving forward on a hearing for this highly qualified nominee and express my strong support for his nomination. I look forward to his approval by the Committee and by the full Senate in the near future. I thank the Chairman and other members of the Committee.

NOMINATION OF ROGER T. BENITEZ, OF CALIFORNIA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

WEDNESDAY, FEBRUARY 25, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:15 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Orrin G. Hatch, Chairman of the Committee, presiding.

Present: Senators Hatch and Feinstein.

Chairman HATCH. I apologize for being a little bit late. I got detained on a District of Columbia matter of great importance, and so I apologize to you.

We are going to start this morning by turning to my distinguished colleague from California, Senator Feinstein, for any comments that she would care to make, and then we will begin with our first panel, which would be Roger T. Benitez, the nominee to the U.S. District Court for the Southern District of California.

PRESENTATION OF ROGER T. BENITEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA, BY HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE CALIFORNIA

Senator FEINSTEIN. Thanks very much, Mr. Chairman. I would like to thank you for holding this hearing on the nomination of Roger Benitez for the district court.

Magistrate Benitez is being considered for the last of the five new judgeships that you helped us with and which were created by Congress in 2002 for the Southern District of California. I would like to tell you a little bit about his life story because it is impressive.

He was born in Cuba. When he was 10, his family fled to America after losing everything when Castro came to power. Pursuing the opportunities that education afforded him, Judge Benitez obtained his undergraduate degree at San Diego State University and his law degree at Western State University.

After law school, he practiced as a private attorney for 19 years in a general civil practice and then was appointed to the State Superior Court by Pete Wilson in 1997. He served on the Superior Court bench for 4 years before he joined the Federal bench as a magistrate.

Judge Benitez's selection was historic because he is the first ever magistrate judge in El Centro, California. As Judge Marilyn Huff indicated in her written testimony—and I would like to enter that testimony into the record, and I would like to make a point that that testimony is concurred in by all of the Federal judges in the Southern District.

Chairman HATCH. Without objection, it will be entered into the record.

Senator FEINSTEIN. Thank you.

As Judge Huff indicated, Judge Benitez's role in setting up the court in El Centro reflects really a significant accomplishment. In 2003, he handled more initial appearances in criminal cases, 1,494, than all 10 magistrates combined from the Northern District of California. He is getting a special hearing because he has received a poor rating from the ABA Standing Committee on the Judiciary. And given this rating, I think it is important to put his nomination into context.

Like the previous district court nominees from California considered during the Bush administration, Judge Benitez is the product of our State's bipartisan Judicial Advisory Committee. The Committee consists of three members selected by Senator Boxer and myself and three members selected by the Bush administration. A nominee is only forwarded to the President if he or she garners the support of a majority of the committee. This process is designed to produce moderate, bipartisan nominees, and it is a model I hope the administration can more frequently emulate.

The Committee unanimously recommended Magistrate Benitez to the President. Given this strong endorsement, I was surprised by the negative ABA rating, and because I had never voted for anyone with a negative ABA rating, I thought I ought to look into it. So I directed a representative on my committee, Mr. David Casey, who is the new president of the American Trial Lawyers Association, to reinvestigate Judge Benitez. Mr. Casey contacted dozens of lawyers and made more than 30 phone calls, came back to Washington to report to me, and he confirmed the committee's commitment to its original recommendation in favor of Judge Benitez.

I find this compelling and give it great weight. I am also impressed by the many testimonials in support, in favor of Judge Benitez. As I mentioned, the entire Federal bench of the Southern District has written to the Committee endorsing him. And, additionally, a number of community leaders, the mayor of El Centro, the Board of Supervisors, the chief public defender of the county, the president of the Imperial—I beg your pardon? Oh, the president of the Imperial County Bar Association. It said "president of Imperial County," and I thought, you know, I know they can be difficult, but I didn't know they had seceded.

[Laughter.]

Senator FEINSTEIN. The sheriff and coroner of Imperial County, and I just want to read a couple of excerpts of what his supporters say. They say he is a man of the highest ethical standard, that he has superb demeanor, intelligence, pragmatism, and fairness. And the chief public defender notes that he has good judicial temperament and is courteous to his employees and the attorneys who appear before him.

I would like to note that he has served as a member of the DeAnza Rescue Unit for over 15 years. That is a volunteer search and rescue organization that operates in Imperial, San Diego, and Riverside counties.

I am very eager to hear the American Bar Association's testimony because, as we tried to go back over the accusations of temperament, ill-advised temperament and that kind of thing, it turned out that it all revolved around one incident, which involved the calendaring of a case on Christmas Eve. My staff got the case transcript, and the attorney in the case said, "My goodness, you know, this shouldn't prevent his consideration as a judge."

So after more than 30 additional phone calls and talking to dozens of lawyers, Mr. Casey was not able to come up with anything that he felt should disqualify Judge Benitez.

Chairman HATCH. Well, thank you, Senator. That is very good testimony.

I happen to have a very high regard for David Casey and know how serious he takes appointments to the Federal bench. Plus he is a very good leader of the American Trial Lawyers Association, and I have a lot of respect for his integrity. And, Judge Benitez, Mr. Benitez, you come very highly recommended by others.

I think what we are going to do is have you come to the table, and please stand and we will swear you in. Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?

Judge BENITEZ. I do.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Chairman HATCH. Please take a seat. Let me just say a few words here myself.

Senator Feinstein takes this job very seriously on the Judiciary Committee. She is one of our better members as far as I am concerned, and I am pleased with her recommendation here this morning. And I am pleased also to welcome to the Committee this morning Judge Roger Benitez, whom President Bush has nominated to fill a vacancy on the United States District Court for the Southern District of California.

Judge Benitez comes before us today as a highly regarded Federal magistrate, with an impressive record of judicial service. Born in Havana, Cuba, Judge Benitez's life embodies the spirit and the strength of this Nation. After coming to this country, he overcame numerous obstacles to put himself through college at San Diego State University and then obtained his law degree at Wester State University College of Law in 1978, and then has distinguished himself in a diverse and successful law practice in Imperial County, California.

Judge Benitez, as I reviewed the impressive list of groups and individuals whom you have represented, I wonder if there is anyone in El Centro that you didn't represent. You were appointed to the Imperial County Superior Court in 1997 and re-elected in 1998. I believe you have served with distinction until 2001, and since then you have served as a Federal magistrate judge in the Southern District of California.

Now, I would note that the bipartisan Committee selected Judge benitez for his current position after a thorough review of his record and experience. Another bipartisan nominating commission found Judge Benitez to be highly qualified and recommended that he be appointed a district judge.

Despite these accomplishments and endorsements, a majority of the American Bar Association Standing Committee on the Federal Judiciary returned a rating of "Not Qualified" for Judge Benitez. In such instances, it has been the practice of this Committee to invite representatives of the ABA to explain their basis for this rating. Later in this hearing, we will hear from Tom Hayward, who is Chair of the ABA Standing Committee, and Richard Macias, a former member of the Committee and circuit member who conducted the evaluation that led to Judge Benitez's rating. And I welcome them on behalf of the Committee.

Finally, we will also hear from Judge Benitez's current supervisor, the Chief Judge of the Southern District of California, Judge Marilyn L. Huff. We welcome you, Judge Huff, to the Committee, and we understand you will attest to Judge Benitez's fitness for the Federal bench, also his legal aptitude and experience, his integrity, and, most notably, his judicial temperament. It is my understanding that concerns pertaining to temperament served as the basis for the ABA's rating, but I expect that Judge Huff's testimony today should satisfactorily address any lingering questions about Judge Benitez's temperament. I understand that Judge Huff is in the middle of a very important trial, and it is, I think, great testament to you, Judge Benitez, that despite her extremely busy schedule, she was eager to come to Washington on relatively short notice to testify on your behalf.

I would note that Judge Huff's testimony is endorsed by all 11 active judges of the Southern District of California. Now, these are the people with whom Judge Benitez has worked closely for the past 3 years. They all support the nomination of Judge Benitez. They have put the weight of their admirable reputations behind Judge Benitez's nomination.

In addition to this testimony, the Committee has received written testimony and letters which strongly support Judge Benitez's nomination. So without objection, I will submit all of these for the record. Since we will not hear from these witnesses in person, I would like to take a moment just to share some of their views on Judge Benitez.

U.S. District Court Judge John Houston got to know Judge benitez both professionally and personally when they worked together as magistrates in the Southern District. Judge Houston writes that he has "observed his good character, integrity and temperament along with his dedication to public service to be invariant. In addition, Judge Benitez's experience as a lawyer and State court trial judge will make him an invaluable member of our bench and a source of pride for the citizens in this district for many years to come."

Now, the presiding judge of the Superior Court of Imperial County, Raymond Cota, was extremely surprised to learn of the ABA's rating. He was born and raised in Imperial County and has worked closely with Judge Benitez. He wrote that he has "never, in 25

years as an attorney and judge in Imperial County, heard any unflattering remarks or criticism of Roger Benitez of any sort."

Randy J. Rutten, the president of the Imperial County Bar Association, submitted this testimony: "I am the current president of the Imperial County Bar Association. On August 6, 2003, the Board of Directors of the Imperial County Bar Association unanimously and enthusiastically voted to endorse and support the nomination of Roger T. Benitez as an Article III judge for the Southern District of California. Our decision was based on Judge Benitez's reputation in the legal community as well as in the community in general."

Gary Wyatt, Chairman of the Board of Supervisors, the County of Imperial, offered this testimony regarding Judge Benitez: "In 1997 he was appointed to the Superior Court by the then Governor of the State of California. Before he was appointed, he was vetted by the Judicial Nominations Evaluation Committee of the State of California. As part of that evaluation, confidential questionnaires were sent out to over 150 lawyers and judges asking for information concerning his legal ability, ethics, work ethics and temperament....During his tenure on the Superior Court, Judge Benitez proved himself to be a capable jurist who was valued and respected by the bar and his fellow judges. He had a reputation for being able to handle difficult legal tasks, exhibiting good judicial temperament and always being more than willing to assist his fellow judges, even if it meant asking other judges if he could help them with their calendars....Because of his excellent reputation in the legal community and the community in general, our board of supervisors has unanimously adopted a resolution...endorsing and recommending the confirmation of Hon. Roger T. Benitez to the position of district judge for the Southern District of California."

Eduardo A. Rivera, former Democratic mayor of the City of Calexico and an attorney, wrote: "Judge Benitez is fair, rational, intelligent, and just. I have been treated with respect in all of my private practice dealings with Judge Benitez before he assumed the bench and have been treated fairly and equitably in his courtroom. Judge Benitez is compassionate and fair. It is therefore with dismay that I find some attorneys who have deemed his courtroom demeanor and temperament as improper. At no time in the last 25 years have I ever seen Judge Benitez exercise bad judgment or be discourteous with any person he has dealt with in either his capacity as a private attorney or as a State or Federal judge."

Neil Gerber, an attorney in the municipality of El Centro, stated, "As a State court judge, and then as a Federal magistrate, Magistrate Benitez was always well prepared, engaging, and fair. His judicial temperament was excellent in all respects. He himself displayed the highest respect for the courts, and inspired the same feeling in those who entered his courtrooms. Both as a State court judge and as a Federal magistrate, Magistrate Benitez enjoyed the highest reputation for ability and integrity among the local bar."

Now, these and other statements of support indicate clearly that Judge Benitez has the legal experience, ability, aptitude, character, integrity and temperament to serve as a Federal district judge. So I am looking forward to hearing and reviewing the testimony today as we consider this nomination, and I will look forward to chatting with you, Judge Benitez, and then with our American Bar Associa-

tion, which, really, we owe a debt of gratitude to for the work that they do in general with regard to Federal judges. I have a lot of respect for the current Standing Committee, and it is upsetting to find that they did come up with this type of rating. But we will listen to them and give every respect to them that we can, but we are also going to listen to you, Judge Benitez, and go from there.

Now, I also am pleased to announce that this hearing is the first of a pilot program to provide closed-captioning, and I am pleased Senator Leahy and I, with the Secretary of the Senate, were able to come to these arrangements. So we are very pleased to start closed-captioning, and you are the first one to be subjected to that. But that will be a good thing, I think.

Well, let me ask you, Judge Benitez, do you have any opening statement you would care to make before we ask some questions? You might press that button.

STATEMENT OF ROGER T. BENITEZ, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Judge BENITEZ. Thank you, Mr. Chairman, Senator Feinstein, ladies and gentlemen, staff members, and ladies and gentlemen of the public. I don't have an opening statement, but if I could, I would like to take a moment to introduce my family and some of my friends.

Chairman HATCH. We would love you to do that.

Judge BENITEZ. Thank you.

I would like to commence with the chief judge our district, Chief Judge Marilyn Huff.

Chairman HATCH. We are very honored you would take time to come and help us with this matter.

Judge BENITEZ. My wife, Kitty Benitez; my mother, Elsa Hegan. Starting from the left, my son, Dr. Benitez; his close friend, Dr. Shannon Thyne; my daughter, Mary Benitez; and her close friend, Zack Friesland.

Chairman HATCH. Well, we are delighted to have all of you here. We welcome you to the Committee, and we hope it will be a nice experience for you. We will have to see.

Judge BENITEZ. Mr. Chairman, I thank you and I thank the Committee and I thank the President for giving me the opportunity to be here today. I will certainly answer any questions that you or Senator Feinstein may have, or any other Senator may have.

Chairman HATCH. Well, thank you so much.

Judge BENITEZ. Thank you.

[The biographical information follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Roger T. Benitez, Roger Thomas Benitez, Roger Benitez, Roger Benitez Hernandez.

2. Address: List current place of residence and office address(es).

- **Residence- El Centro, CA**
- **Office- United States District Court, 321 South Waterman, Suite100, El Centro, CA 92243.**

3. Date and place of birth.

December 30, 1950. Havana, Cuba

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married, Cathryn Christine (Carr) Benitez. Teacher; Central Union High School District, 351 Ross Ave., El Centro, CA 92243.

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

- **Western State University (Thomas Jefferson University)**
  attended 1975-1978; Juris Doctor; May 1978.
- **Northern Arizona University**
  attended July 1974-August 1974;no degree
- **San Diego State University**
  attended 1972-74;Bachelor of Arts; June 1974
- **Imperial Valley College**
  attended 1969-1971;Associate of Arts; June 1971

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

- **United States District Court, Southern District of California. Magistrate Judge. January 2001 to present.**
- **Imperial Valley College, External Campus. Professor. 1992, 1993 and 1998 to 1999.**
- **State of California. Superior Court Judge. 1997 to January 2001.**
- **Heim, Benitez & Driskill LLP. Attorney. 1996 to 1997.**
- **Heim, Benitez & Driskill APC/ Heim & Benitez APC/ Heim & Benitez. Attorney/partner/shareholder. 1981 to 1995**
- **Law Offices of Thomas M. Heim. Attorney/research clerk. 1978 to 1981.**
- **El Centro Elementary School, Central Union High School, Calexico School District. Substitute Teacher. 1974 and 1975.**

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

None

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

- **California Bar Association.**
- **Imperial County Bar Association Director–Approximately 1982-1986; President 1986-1987.**
- **American Trial Lawyers Association.**
- **California Judges Association.**

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

- **I belong to Ducks Unlimited which lobbies for wetlands conservation projects and sport hunting interest. I also belong to the California Judges Association which lobbies on issues of interest to active and retired**

California judges.

- **Kiwanis Club of El Centro.**

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

- **California Supreme Court, May 31, 1979**
- **U. S. District Court, California, (Southern District) June 7, 1979**
- **U. S. District Court, California, (Northern District) March 8, 1988**
- **U.S. District Court, California, (Eastern District) February 22, 1990**
- **U. S. District Court. California, (Central District) July 29, 1993**

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

None.

13. Health: What is the present state of your health? List the date of your last physical examination.

Very Good. April 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court

- **United States Magistrate Judge. Appointed. The jurisdiction of magistrate judges is governed by the Federal Magistrates Act, 28 USC 631 et. seq.**

- **California Superior Court Judge, Imperial County. Appointed August 1997. Elected 1998. When I was first appointed, the Superior Court was a court of general jurisdiction with jurisdiction over all matters except civil cases where the amount in controversy was less than $25,000.00 and criminal matters involving misdemeanors. The Municipal and Superior Courts were later unified so that the Superior Court had general jurisdiction over all cases.**

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with

significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

- 1. 01cv0063 JM (BEN) *Michael P. Cefaratii v. Teresa Rocha*
  Petitioner was charged with causing penetration of genital and anal openings of two females by force. He was also charged with kidnaping for the purpose of committing the crime of rape by a foreign object, and committing sexual battery. He used a knife during the commission of these crimes. Petitioner was convicted by a jury on all counts. In his habeas petition, Petitioner claimed ineffective assistance of counsel (failure to investigate and to call a witness), and factual innocence.

  The Court held that Petitioner failed to offer any evidence, which could potentially demonstrate that trial counsel's performance was deficient, or that the alleged deficient performance prejudiced the defense.

  The report and recommendation denying Petitioner's habeas petition was adopted by District Judge Jeffrey T. Miller, and the Ninth Circuit Court of Appeals denied Petitioner's Certificate of Appealability.

  2. 00cv1654 JM (BEN) *Craig W. Nelson v. Ernest Roe*
  Pursuant to a plea agreement, Petitioner pled guilty to one count of possession of methamphetamine. He had two prior convictions for burglary. Pursuant to the plea agreement, count two of the information, receiving stolen property, was dismissed and the sentencing of Petitioner was to be left to the discretion of the court. He was then sentenced to 25 years to life. In his habeas petition, Petitioner made 21 claims, which can be summarized as follows: (1) prosecutorial misconduct; (2) ineffective assistance of trial counsel; (3) ineffective assistance of appellate counsel; (4) double jeopardy and ex post facto violations stemming from the use of his 1982 burglary conviction as a "strike prior" under California's "three strikes" law; (5) due process violation stemming from the trial judge's finding that Petitioner's 1982 plea was constitutionally valid; (6) due process violation stemming from the trial judge's failure to permit Petitioner to withdraw his plea after the state appellate court vacated Petitioner's first sentence; and (7) the cumulative effect of the errors.

  Upon review of the record, the Court held the California Court's court's adjudication of theseclaims was neither contrary to any decision of the United States Supreme Court nor was it an unreasonable application of the Court's governing principles.

  The report and recommendation denying Petitioner's habeas petition was

adopted by District Judge Jeffrey T. Miller, and the Ninth Circuit Court of Appeals denied Petitioner's Certificate of Appealability.

3. 92cv0349 W (BEN) *Steven Charles Martinez v. Lori Dicarlo, Warden*
Petitioner was convicted of kidnaping, two counts of rape, two counts of oral copulation, rape by a foreign object, battery with serious bodily injury, two counts of assault with a deadly weapon or with force likely to produce great bodily injury, and hit and run with injury. In a separate proceeding, the trial court found that Petitioner had been convicted of a prior serious felony and a prior serious/violent felony. He was sentenced to state prison for a term of 165 years to life. In his habeas petition, Petitioner claimed: (1) ineffective assistance of counsel; (2) three different sentencing errors deprived him of due process; and (3) his 165-year to life sentence constituted cruel and unusual punishment.

The Court found that Petitioner failed to demonstrate that his trial counsel's performance was deficient, or that the alleged deficient performance prejudiced the defense. The Court held that it could not be reasonably concluded that trial counsel was ineffective for abandoning a "delirium defense theory," if that same defense would not have been permitted under state law. The California courts' interpretation and application of the case law governing the delirium defense was neither contrary to any decision of the United States Supreme Court nor was it an unreasonable application of the Court's governing principles. It was a question of state law which the Court left undisturbed.

The Court further determined that the interpretation and application of California's sentencing laws did not violate federal constitutional due process rights, and held that because his sentence was not grossly disproportionate to his severe crimes and in light of his prior serious felony history, Petitioner's sentence did not violate the Eighth Amendment's prohibition.

The report and recommendation denying Petitioner's habeas petition was adopted by District Judge Thomas J.Whelan, and Petitioner's Motion for Reconsideration was denied. The Ninth Circuit Court of Appeals denied Petitioner's Certificate of Appealability.

4. 98cv1816 K (BEN) *Javier Mendez, aka: Gilberto Benitez v. Ernie Roe, Warden, et. al.*
Petitioner was convicted of transporting marijuana, possession of marijuana for sale, and using a false compartment to smuggle drugs. In his habeas petition, Petitioner claimed that: (1) he was deprived of his rights under the Vienna Convention; (2) the state court lacked jurisdiction; (3) he received ineffective assistance of trial counsel; (4) the trial court failed to instruct *sua sponte* on simple possession as a lesser included offense of possession for sale;

and (5) his 1984 prior conviction was invalid.

The Court disagreed with Petitioner's contention that his conviction should be reversed because he was not advised of his rights under the Vienna Convention, and his request to consult with the Mexican Consulate was ignored. The Court did not find any authority which held that the Convention created individual rights, much less warrant reversal of a conviction. Even if reversal were an appropriate remedy for a violation of the Convention, a showing of prejudice was not made by the Petitioner. The Court also disagreed with Petitioner's contention that he was prejudiced because he was unable to communicate in English with his lawyer and was forced to go trial while he was suffering from mental illness.

Petitioner had not established that the consular representative would have done anything to help him and, if the consul had, it would have changed the outcome of the trial. A consular representative could not have given Petitioner any legal advice since the Convention prevents them from rendering any such legal assistance. The record showed that Petitioner sufficiently spoke and understood English. To date no federal court has held that a violation of the Vienna Convention requires reversal.

The report and recommendation denying Petitioner's habeas petition was adopted by District Judge Judith N. Keep. Petitioner's Certificate of Appealability is pending in the Ninth Circuit Court of Appeals.

5. 98cv2101 W (BEN) *Mark Alan Radke v. Ernest Roe, et al.*
Petitioner was convicted of first degree murder. He was sentenced to a state prison term of 25 years to life on the first degree murder count. In his habeas petition, Petitioner claimed ineffective assistance of trial counsel. He argued that trial counsel: (1) failed to present Petitioner's explanation for the presence of his car's tire tracks at the scene and blood found in his car; and compounded the problem by calling expert witness; (2) did not adequately advise Petitioner regarding the decision to testify; (3) failed to complete and present a psychological profile of Petitioner; and (4) failed to present evidence.

The Court held that the state court's adjudication of Petitioner's claims were neither contrary to nor involved an unreasonable application of clearly established federal law and was not based on unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

The report and recommendation denying Petitioner's habeas petition was adopted by District Judge Thomas J. Whelan. The Ninth Circuit Court of Appeals affirmed the district court ruling.

6. 01cv276 H (BEN) *Ivan Darnell Catlin v. Cal A. Terhune*
Petitioner was convicted of numerous charges arising out of two attacks (three males fired shots at a woman as she sat in her car and these same men entered into another man's apartment, bound him, and stabbed him). In his habeas petition, Petitioner claimed that: (1) the prosecutor used peremptory challenges to exclude all Blacks from the jury in violation of this Fourteenth Amendment right to due process; (2) he suffered ineffective assistance of trial counsel; and (3) the prosecutor committed misconduct in characterizing a witness's identification of Petitioner.

The Court held that under the circumstances presented, the trial court reasonably found Petitioner had not proven that the prosecutor had a discriminatory purpose in excluding the jurors in their case. The Court also determined that: (1) Petitioner reargues factual matters which were determined adversely to him by a jury; (2) there was sufficient evidence to convict Petitioner; (3) Petitioner was not prejudiced by false testimony given at trial; and (4) Petitioner was not denied a fair trial by the prosecutor's misstatements.

The report and recommendation denying Petitioner's habeas petition was adopted by District Chief Judge Marilyn L.Huff. The Ninth Circuit Court of Appeals denied Petitioner's Certificate of Appealability.

7. 01cv1878 JM (BEN) *Juan Carlos Martinez v. D.G. Adams, Warden*
Petitioner was convicted of two counts of assault with personal infliction of great bodily injury and personal use of a deadly weapon, and two counts of attempted taking of vehicles as well as a related misdemeanor. The jury also found that Petitioner had committed two prior serious/violent felonies, one serious felony prior conviction, and suffered one prison prior. Because the two prior convictions for robbery constituted serious felonies, Petitioner was sentenced to an indeterminate term of 33 years to life. In his habeas petition, Petitioner claimed that his sentence violated the Eight Amendment's prohibition on cruel and unusual punishment.

The Court concluded that the California Court of Appeal did not unreasonably apply clearly established Supreme Court precedent when it determined that Petitioner's sentence does not raise an inference of gross disproportionality to the crime committed in violation of the Eighth Amendment. The Court determined that this conclusion was bolstered by the California Court of Appeal's recognition that segregation and its duration under a recidivist statute are based not merely on Petitioner's most recent offense but also on the propensity he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes.

The report and recommendation denying Petitioner's habeas petition was

adopted by District Judge Jeffrey T. Miller, and Petitioner's Motion for Reconsideration was denied. The Ninth Circuit Court of Appeals denied Petitioner's Certificate of Appealability.

8. 01cv0466 K (BEN) *Jesus Alonso Gonzalez v. Teresa Rocha, Acting Director* Petitioner was convicted of attempted murder and kidnaping. In his habeas petition, Petitioner claimed: (1) a prosecution witness's false testimony violated his right to due process; (2) prosecutorial misconduct; and (3) the trial court erred in not permitting cross-examination of a prosecution witness.

The Court held that Petitioner was not entitled to habeas relief based on his claim that he was denied due process when the principal witness falsely testified that the prosecution did not offer him a deal in exchange for his testimony against Petitioner. It found that the witness was never informed of any prosecution offer at the time of his testimony in the case; and his credibility was for the jury to determine. The Court also concluded that the trial court gave sufficient latitude to Petitioner's counsel to cross-examine the principal witness regarding the prosecution's plea offer; and Petitioner's trial counsel made a tactical decision not to further cross-examine the witness on that issue.

The report and recommendation denying Petitioner's habeas petition was adopted by District Judge Judith N. Keep. The Ninth Circuit Court of Appeals denied Petitioner's Certificate of Appealability.

9. 99cv922 K (BEN) *Henry M. Zimmeth v. C.A. Terhune, Director, et al.* Petitioner was convicted of one count of felony evading an officer and one count of misdemeanor evading an officer. Petitioner admitted a prior strike and serving two prior prison terms. Petitioner was sentenced to 7 years consisting of 3 years for the felony conviction, doubled to 6 years because of a prior strike. The court added 1 year for a prior prison term, and struck a second prior prison term enhancement. In his habeas petition, Petitioner claimed that: (1) the record is prejudicially inadequate because the 911 tape heard by the jury was not introduced into evidence; (2) the prosecution's failure to disclose the 911 tape prior to his trial prevented him from preparing for it; (3) the trial court erred by improperly instructing the jury by using the terms "distinctive uniform" and "distinctively marked vehicle"; (6) he suffered ineffective assistance of trial count; (7) he suffered ineffective assistance of appellate counsel; (8) the trial court erred by allowing an uncharged offense to be introduced at his trial; (9) the police questioned him without advising him of his *Miranda* rights; (10) he was denied a fair trial because a prosecution witness gave inconsistent testimony; and (11) there was insufficient evidence to support his conviction.

The Court noted that state evidentiary rulings ordinarily do not present federal constitutional questions, and determined that the appellate court's rejection of Petitioner's claim that the prosecution's failure to disclose the fact prior to his trial prevented him from preparing for it, was neither contrary to, nor an improper application of, federal law. The Court also held that the record showed that Petitioner has an extensive history of criminal conduct, and that given his background, Petitioner cannot show that his sentence was "fundamentally unfair."

The Court also concluded that Petitioner failed to satisfy his burden to demonstrate the invalidity of any prior convictions, and thereby prevent their consideration of sentencing purposes.

Further, the Court found nothing in the record to suggest that Petitioner, who had been given a *Miranda* warning within the previous 30 to 45 minutes suddenly was no longer aware of his rights. At no point during this time did Petitioner assert a desire to be represented by counsel or to remain silent at any time. Since only a brief period of time elapsed between the sessions, no further warning was required.

The report and recommendation denying Petitioner's habeas petition was adopted by District Judge Judith N. Keep.

10. 99cv1775 *Byran Edwin Ransom v. M. Sandoval, et.al,*
Plaintiff, a state prisoner, complained that several officials at Calipatria State Prison violated his due process, equal protection, and Eighth and First Amendment rights. The parties consented to proceed before a United States Magistrate Judge, and the case subsequently was transferred to a different magistrate judge. The first judge, James F. Stiven, denied leave to file the Fourth Amendment Complaint, and the second judge, Roger T. Benitez, dismissed the Third Amended Complaint with prejudice.

The Court concluded that Plaintiff's Complaint failed to state a claim upon which relief may be granted because he did not allege or show physical injury as required by 42 U.S.C. § 1997e(e). It also determined that Plaintiff failed to state any facts as opposed to conclusions that would support a finding of discriminatory animus by any Defendant. Plaintiff did not claim that the alleged false reported resulted in restrictions that were "atypical and significant,"and Plaintiff was not subjected to any disciplinary action as a result of the alleged false reports. Plaintiff failed to show that Defendant's actions did not "advance legitimate penological goals."

Plaintiff appealed, and the Ninth Circuit Court of Appeals reversed and remanded. The Court held that the Magistrate Judge should have granted plaintiff leave to file the Fourth Amended Complaint. It had no comment on

the merits.

- **As a Superior Court judge, I mostly handled criminal cases which did not result in written opinions.**

- **As a magistrate judge I issued an order dismissing a complaint in *Bryan Edwin Ransom v. Sandoval*, et. al. The Ninth Circuit reversed the dismissal. However, the reversal was not of my order dismissing the complaint, but of an order by another magistrate judge denying plaintiff the right to file a fourth amended complaint. A copy of that opinion is attached. ****

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

- **City of El Centro Planning Commission.1989-1996 appointed**

- **County of Imperial Private Industry Council.1994-1996 appointed.**

- **In 1994, I ran for a Superior Court position.**

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;
No.

2. whether you practiced alone, and if so, the addresses and dates;
No.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

- **Heim, Benitez & Driskill LLP. 1221 State St. El Centro, CA 92243. Attorney. 1996 to 1997.**

- **Heim, Benitez & Driskill APC/ Heim & Benitez**

APC/ Heim & Benitez. 1221 State St. El Centro, CA 92243/ 895 Broadway, El Centro, CA 92243. Attorney/partner/shareholder. 1981-1995

- **Law Offices of Thomas M. Heim. 1221 State St. El Centro, CA 92243. Attorney/research clerk. 1978 -1981.**

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

My practice was very general. I practiced first with a sole practitioner, then in a partnership, and eventually in a five lawyer firm. My office was located in a small agricultural community with a population of thirty two thousand and a county wide population of approximately 150,000. For the first five or so years of practice, I represented clients in civil and criminal cases. I tried several misdemeanors and felonies and handled hundreds of others. My civil practice included almost all areas of law practice, from adoptions to zoning disputes. Although my office was located in a small agricultural community, I litigated cases filed in every district court in California, in several major cities and several states.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

My clients included individuals, family owned businesses and farms, large corporations and a few multi-national corporations. Among my clients were farmers, cattlemen, pest control operators, agricultural equipment rental companies, small and large seed companies and a non profit farm worker entity. I also represented title companies, escrow companies, real estate agents and brokers, lending institutions such as banks, credit unions, small business development companies and farm lenders. I represented engineering companies, insurance companies, a mining company and a major oil company. I also did work for two school districts, a water district and a non profit low income development company. Finally, I represented many individuals in personal injury and/or wrongful death actions.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each

such variance, giving dates.

I appeared in court frequently. Because of the general nature of my practice, the frequency of my court appearances would fluctuate depending on business cycles.

2. What percentage of these appearances was in:
   (a) federal courts; **5%**
   (b) state courts of record; **92%**
   (c) other courts. **3%**

3. What percentage of your litigation was:
   (a) civil; **80%**
   (b) criminal. **20%**

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

   My best estimate is perhaps two dozen. I was sole counsel in all but one of these cases.

5. What percentage of these trials was:
   (a) jury; **10%**
   (b) non-jury. **90%**

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

***Rattan Dhillon v. Kartar Kaur Dhillon*, (1980) Imperial County Superior Court, Case No. 52645**

This was an action to impose a constructive trust and cancel deeds that had been executed by the decedent. The decedent, a successful farmer, had executed several wills leaving his property to his wife. The children of the decedent from a prior marriage filed an action to set aside the wills on the grounds of undue influence and lack of mental competency. That action went to trial and the wills were set aside. I did not represent the widow in that matter.

After that verdict, an action was commenced to set aside several deeds the decedent had executed creating joint tenancies. The decedent's children through a special administrator then filed an action to set aside deeds executed by the decedent, which in effect, transferred a significant portion of what would have been the decedent's estate to his widow. I represented the widow in that action. The case was settled on the third day of trial.

The Judge was the Hon. L. Harold Chaille.

The defendant was represented by Heim & Benitez. The petitioner was represented by Sutherland & Gerber and Lowell Sutherland, 300 S. Imperial Ave., El Centro, CA 92243, (760) 353-4444.

I reviewed transcripts of the previous case, filed pleadings, conducted discovery, filed and opposed motions, prepared for trial, tried the case and effected a settlement.

Quali-Sel v. Neuman Seed Co. (1981); United States District Court, Southern District of California, Case No. 81cv1043

Quali-Sel had obtained a plant variety protection certificate (PVC) on a type of iceberg lettuce called "Excel." Defendant Neuman Seed Co. was selling a type of iceberg lettuce which had similar characteristics as "Excel." Quali-Sel alleged that Neuman's variety infringed on Quali-Sel's PVC. The case settled shortly before trial.

The trial judge assigned to the case was the Hon. Rudi S. Brewster.

Plaintiff was represented by Knobbe, Martens, Olson and Bear and Don Martens LLP, 550 West C Street, Suite 1200, San Diego, CA 92101, (619) 235-8550. Defendant was represented by Heim & Benitez.

My role was to research and prepare pleadings, conduct discovery, retain experts, prepare for trial and assist in the settlement of the case.

A & M Produce Co. v. FMC Corp. (1982), Fourth District Court of Appeals, Div. One., 135 Cal. App. 3d 473; 185 Cal. Rptr. 114

In this case, plaintiff A & M Produce, a small farming operation, had

purchased tomato sizing equipment from defendant. The tomato "sizer" did not work as represented, resulting in significant damages to plaintiff's tomato crop. Defendant contended that the "sizer" performed as warranted. The case went to jury trial twice, each time a defense verdict was returned. The case went to trial a third time. This time, a plaintiff's verdict was returned. An appeal followed and the decision was affirmed in a published decision.

The significant issue that differentiated the third trial from the first two was that the judge did not allow evidence of warranty disclaimers to be presented to the jury. The trial judge ruled that as a matter of law the disclaimers were unconscionable and were contracts of adhesion.

Plaintiff was represented by Heim & Benitez and Thomas M. Heim. Defendant was represented by Bird, Sturdivant, Nassif & Pinney and Andrew Krutzch, 104 West I Street, Brawley, CA 92227, (760) 344-8121 and Paul, Hastings, Janofsky & Walker and Douglas Conroy, 555 South Flower Street, 23rd Floor, Los Angeles, CA 90071, (213) 683-6000.

My role in the case was to research and draft the motion for new trial after the second jury trial, research and draft trial briefs and motions in limine on various issues, including unconscionability and contracts of adhesion, and to research and assist in the preparation of appellate briefs.

People of the State of California v. K.E.C.Y., et al., (1984) Imperial County Superior Court, Case No. (unknown).

Our clients were K.E.C.Y. TV, a local television station, its owner, the station manager, and one of its reporters.

The State of California sought to have a local television station, its owner, the station manager, and one of its reporters held in contempt for allegedly leaking information from the grand jury proceedings. I represented the station and related parties. The central issue in the case was whether or not the station and its reporter were protected by the First Amendment and by the Newspaper Shield Law that had recently been enacted in California.

The court found that my clients were immune and did not hold them in contempt.

The assigned Judge was the Hon. Henry Wien.

The state was represented by the District Attorney's Office and the District Attorney, Thomas W. Storey, Esq. (Anderholt & Storey, 654 W. Main St., El Centro, CA 92243, (760) 353-7744).

The media respondents were represented by Heim & Benitez and Roger T. Benitez.

I assisted in researching and drafting our written opposition and argued in opposition to the motion for contempt.

Valdez v. Smith (1985) Fifth District Court of Appeals, 166 Cal. App. 3d 723; 212 Cal. Rptr. 638

I represented the mother, as guardian ad litem, of a 14 year-old boy whose father had been killed in a 100-car accident approximately ten years earlier. My client and her son lived in Mexico. She was divorced from the boy's father. The boy's father had remarried and had children from the second marriage. A lawsuit filed by the second wife on behalf of herself and her children for the wrongful death of the father had been settled many years earlier. None of the proceeds from the settlement of that suit were paid to my client's son. When my client learned that her son had a right to a portion of the settlement she retained our firm to file an action on her son's behalf.

A wrongful death action was filed but was prematurely ended by the trial court's granting of a motion for summary judgment. The legal basis for the judgment was that under California law, only one action could be maintained for the wrongful death of a person. We contended that the defendant had waived the one action rule. The judgment was reversed in a published opinion and the case was eventually settled.

Plaintiff was represented by Heim & Benitez and Young, Woolridge, Paulden, Self, Farr & Griffin and Larry Cox, 1800 30th Floor, Bakersfield, CA 93301, (661) 327-9661. Defendant was represented by Clifford, Jenkins & Brown and Stephen Clifford, 1430 Truxtun Ave. #900, Bakersfield, CA 93301, (661)322-6023.

My role in the case was lead counsel. I conducted the initial investigation, prepared and filed pleadings, coordinated discovery, prepared briefs and opposition to motions, and researched and drafted the briefs on appeal.

In the Matter of the Trust Dated December 14, 1978 by Gregory Cason, et al., (1988) Imperial County Superior Court, Case No. 13120

This was an action for breach of fiduciary duty. In this action a beneficiary of the trust was alleging various and sundry breaches of fiduciary duty by the trustee. The trustee was the plaintiff's mother. At the heart of the claim were several contractual arrangements that the trustee had made to free the trust *res* from claims by the creditors of another beneficiary and to facilitate the sale of the property for a considerable gain to the trust.

The Judge was the Hon. James Harmon.

The trustee was represented by Heim & Benitez. The beneficiary was represented by Horton, Knox, Carter & Foote and Phillip J. Krum, Jr., 895 Broadway, El Centro, CA 92243, (760) 353-2821.

I advised the trustee how to clear title free of the creditors' claims, negotiated and drafted a limited partnership agreement with the developer, and defended the trustee in the action. The trustee prevailed at trial and the property was sold resulting in a significant gain for the trust.

John Elmore v. Union (Unocal) Oil Co. (1989); Imperial County Superior Court, Case No. 67291

Plaintiffs, a highly respected local farming family, contended that Unocal had entered into a lease with defendants to develop the geothermal field under plaintiffs' farmland. Unocal had built several geothermal plants which exploited these geothermal resources, but plaintiffs contended that Unocal had a duty to further develop the field. Unocal contended it had no duty to conduct further development since it had purchased fee title to the geothermal rights *rather* than leased a *profit a prendre.* Furthermore, Unocal contended that the field was as developed as was reasonable under then existing conditions. The case settled after the judge ruled on the motions in limine.

The assigned Judge was the Hon. William Lenhardt (Ret.).

Plaintiffs were represented by Tourtelot & Butler and Robert Tourtelot, 11835 West Olympic Blvd. #1090, Los Angeles, CA 90064, (310) 575-5600. The defendants were represented by: Heim & Benitez and Roger T. Benitez; Baker & McKenzie and Gordon Bosserman (now with Stephan, Oringer, Richman & Theodora, 2029 Century Park East, 6th Floor, Los Angeles, CA 90067, (310) 557-2009); and Keesal, Young & Logan and Skip Keesal, 4 Embarcadaro Center, 400 Oceangate, Long Beach, CA 90802, (562) 436-2000.

My role was to assist in the preparation of the defense, review motions and oppositions thereto, argue and defend motions, prepare and review discovery, attend depositions, and prepare for examination and cross examination of witnesses.

Patrick Bush v. Mozelle Hanan, (1989) Imperial County Superior Court, Case No. 71095

This was a case of seller's remorse. The defendant had sold real property to the plaintiff. She subsequently refused to close escrow. I filed an action for specific performance on behalf of my client. The action went to trial. We prevailed at trial and the defendant was ordered to sell the property pursuant to the terms of the contract. The principal issue in the case was whether the buyer himself had to have the ability to perform in order to compel specific performance or whether a third party

could complete performance.

The Judge who tried the case is now a highly respected Appellate Justice who was sitting by assignment, the Hon. Justice Robert Stanisforth.

The plaintiff was represented by Heim & Benitez. The defendant was represented by Patrick McCullough, Esq., P.O. Box 3802, Oakland, CA 91162, (510) 655-5912 and Arthur H. Skola, Esq., 9320 Hazard Way, Suite A1, San Diego, CA.

I investigated the case, prepared the pleadings, conducted discovery, participated in settlement discussions and tried the case.

Abott & Cobb v. Neuman Seed Intl. et al., (1990) U.S. District Court for the Southern District of Texas – McAllen Division (case no. unknown)

This was one of several actions or proceedings arising out of the sale of allegedly defective seed sold by my client throughout various parts of the United States, Mexico, and South America. The seed had been purchased from another seed company which had filed for bankruptcy protection.

My role in this matter was to advise the client on various defense and settlement strategies, defend several actions, and prosecute an action for leave to file a late claim in bankruptcy. I associated a former bankruptcy judge, Seymour Abrahams, to assist in the filing and prosecution of leave to file a late claim, and also associated counsel in Texas to help us with the defense of this action. We did not prevail in the late claim proceeding and the various actions were settled.

The Judge was the Hon. Ricardo Hinojosa.

The defendant was represented by Heim & Benitez and O.C. Hamilton, Jr. (Atlas & Hall), P.O. Box 3725, McAllen, TX 78502, (956) 682-5501. Plaintiff was represented by Malesavos & Martin and John Malesovas, 425 Austin Ave. 17th Floor, Waco, TX 76701, (254) 753-1777.

The bankruptcy proceeding was captioned *In re Sunseed Genetics, Inc.*, and filed in the U.S. Bankruptcy Court for the Northern District of California. The Judge was the Hon. Arthur S. Weissbrodt.

Movant Neuman Seed Co. was represented by Heim & Benitez and Seymour Abrahams, 16791 Potter Ct., Los Gatos, CA 95032, (408) 358-5524. The debtor was represented by Winston & Strawn and Michael Kip Maly, 101 California St., 39th Floor, San Francisco, CA 94111, (415) 591-1424. Other parties were represented by Orrick, Herrington & Sutcliffe and William Coats III, 1000 Marsh Rd., Menlo Park, CA 94025, (408) 998-2000 and Edward A. Kent, Jr., 2500 El Camino Real, Suite 210, Palo Alto, CA 90592, (650) 320-8700.

Thomas P. Gibson v. Zia Cattle Co., et al. (1994), U.S. District Court, Southern District of California, Case No. 94cv0962-IEG (CGA)

This was an action between competing claim holders and the owner of a custom cattle feeding operation. My clients, Alonzo & Yolanda Cantu (defendants and cross-complainants), were one of many investors feeding cattle at the feed lots when the feed lot operator announced it would no longer care for the cattle in its feed lots. It appeared that pre-paid feed money had been spent, but not on feed. Several lots of cattle appeared to have been sold to more than one investor so that there were competing claims in the cattle. Money was owed to my clients for cattle already sold. Claims were filed against the operator and its insurance carrier. The operator filed bankruptcy. And claims in intervention were filed by my client's bank.

The Judge was the Hon. Irma E. Gonzalez.

The defendants and cross-complainants were represented by Heim & Benitez. The other parties were represented by Sutherland & Gerber and Lowell Sutherland, 300 S. Imperial Ave., El Centro, CA 92243, (760) 353-4444, Douglas J. Simpson, 1224 10th St., Coranado, CA 92118, (619) 437-6900, Michael Kopp, (last known address) 1065 E. Main St., Louisville, KY 40206, and McCormick, Barstow, Sheppard, Wade & Carruth and Riley C. Walter and Andrew Metcalf, 5 River Park Place East, Fresno, CA 93720, (559) 433-1300.

My involvement in the case included researching and filing appropriate actions against the feed lot operator, and defending and pursuing claims relative to the competing claims. I also defended an action filed against my clients by the clients' bank and assisted in the research and filing of a state action to determine insurance coverage.

I negotiated a settlement with my clients' bank and with competing claimholders which resulted in my clients and the bank recovering a significant portion of their damages.

This was one of several related cases filed in state and federal courts involving secured interests, insurance coverage, dischargeability of claims, and California cattle branding statutes.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

A significant portion of my practice did not involve litigation. I did considerable transactional work, for example: (1) I structured and documented the sale of several organizational clients including drafting sale contracts, financing documents, escrow

Code of Judicial Conduct. If a conflict is identified, the conflict may be resolved by voluntary recusal, waiver of the conflict or motion for recusal. I have no business or other associations that are likely to result in frequent conflicts. I own stock in a handful of companies which may present a conflict, however, those conflicts would probably be very limited in number.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See attached Financial Disclosure Statement.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached Net Worth Statement

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

I ran for a Superior Court Judge position in the winter of 1993 and Spring of 1994. I did not win. Also, in 1972, while I was in college, I worked for a few days as a volunteer in the San Diego political headquarters for the re-election of President Nixon. My duties were to stuff envelopes.

Chairman HATCH. Let me start off by saying that we have a vote, so we will see how far we can go for the next 7 or 8 minutes, and then Senator Feinstein and I—maybe you should go vote, and if you come back, you can ask questions until I get back. How will that be?

Senator FEINSTEIN. I will not be able to come back.

Chairman HATCH. Oh, you will not be able to come back? Well, then, why don't I let you begin with your questions. If you can't come back, I would rather give you this opportunity, if you would like.

Senator FEINSTEIN. Thank you very much. I appreciate that.

Critics, Judge, have asserted that you tried to punish a lawyer by scheduling a hearing on Christmas Eve. We read the transcript of the incident, which occurred on December 10, 2002. On that day you considered three requests for continuances. Two of the requests you scheduled for December 19th; the third you scheduled for December 24th. I did not detect any animosity or hostile exchanges from the transcript. The lawyer who had the hearing rescheduled for the 24th did not object to the proposed date and actually said that day would be fine.

Can you describe the event for us in that it seems to circulate around about all of these sort of objections to you? Can you explain how you determined the date when a hearing slot is open on the court calendar?

Judge BENITEZ. Thank you, Senator. Yes, I will do my best to be brief.

We try to schedule our hearings so that we have—we do not have a cluttered calendar 1 day and a light calendar another day. It is the practice in our court, because of the volume that we handle, to have the attorneys as they come into the courtroom to come to our courtroom deputy, who is my assistant, and to discuss with the courtroom deputy what dates, if any, they are going to continue any matters to.

Unfortunately, on that particular date, my normal or usual courtroom deputy was out. It was her first week of maternity leave, and we had a courtroom deputy who was filling in from San Diego.

We do things a little differently in El Centro because, again, of the geographic location and because of the volume that we have. She talked to the attorney that was making the special appearance, and she noted on my calendar, which is customary for them to do, the dates that the matters would be continued to. Two of those matters were scheduled for December 19th and one was scheduled for December 24th.

As I call the matters, I always ask the attorneys whether or not that is a date that is agreeable with them, and, of course, I then confirm it with the client. I did that in that case. On all three occasions, the attorney that was appearing specially indicated that, yes, the date that I had chosen was okay.

Subsequently—and I can imagine and understand why—the attorney who was supposed to specially appear discovered or learned, because we normally call them to advise them of the new dates, that we had scheduled him to come out to El Centro on two different dates, and it did not make sense for us to do that. And, frankly, I wished I would have caught it when I was on the bench

but I didn't. And so what we did was that very next day, once we discovered the mistake, I issued a minute order rescheduling the matter that had been scheduled for the 24th to the 19th so that that lawyer would only have to make one trip to El Centro.

Senator FEINSTEIN. The argument against—

Chairman HATCH. Senator, I think I will run over and vote.

Senator FEINSTEIN. All right.

Chairman HATCH. You have about 10 more minutes before you need to leave, and then I will try and hurry back so that we will not detain this hearing longer than it should be.

Senator FEINSTEIN. Fine.

Judge BENITEZ. Thank you, Mr. Chairman.

Chairman HATCH. So I will just leave you.

Senator FEINSTEIN. Thank you.

The argument circulating around your candidacy or your nomination seems to be one of temperament. Do you have a sense of from whence that cometh? And how do you look at your temperament as a magistrate judge as it would be as a full Federal judge?

Judge BENITEZ. Thank you, Senator, for asking that question. We have a high-volume court that we operate in El Centro. Consequently, sometimes we don't have the liberty to perhaps be as relaxed or as—I don't want to say "friendly," but as accommodating as we might be if we had a lighter calendar. It's important that we keep our calendar moving. And, consequently, although I certainly strive to be fair and I strive to be courteous, but we have to move our cases along. And so what we do is we have a system which is what allows us to keep the cases moving.

And so perhaps sometimes because of the fact that we are trying to work with the numbers that we work with and may be perceived by attorneys—perhaps those who don't know me, they may perceive the fact that I'm trying to move the calendar along as a sign of bad temper.

Another thing that's very important in our area, Senator, is this: An awful lot of the people that appear before us are not familiar with the system. And an awful lot of them have a belief, not well-founded but they have a belief that perhaps the prosecutors, the defense lawyers, and the judges are all part of the same team. And so, therefore, I think it is important for them to understand that I'm not part of the team and that I have to maintain a certain distance. And the courtroom is not the place for me to engage in familiarities. Although I have made it a practice to welcome lawyers when they come to El Centro and I make it a practice to wish them a good trip home, generally we try to stick to the business at hand. It is serious business. I take it seriously. And I generally ask for people that appear in my courtroom to do likewise.

Senator FEINSTEIN. I would like to ask you a question about choice and the right to privacy, and this has to do with the 1973 Supreme Court decision *Roe* v. *Wade*. At that time the Court held that the Constitution's right to privacy did encompass a woman's right to choose. It established a trimester system of when the woman would have the absolute right, first trimester, when the State could enter the picture, et cetera.

Do you believe that the Constitution encompasses a right to privacy?

Judge BENITEZ. Well, thank you, Senator. Let me add that if I'm fortunate enough to be confirmed, my job as a district judge is to follow precedent, to take a look at what the law is and to apply the law to the facts of the case before me and to make a decision based on the law and based on the facts.

I believe that the right to privacy is well established in our jurisprudence. It has been considered by the Supreme Court on several occasions, and certainly if I am confirmed, I will more than follow the precedent that has been set.

Senator FEINSTEIN. Then do you believe that that right to privacy exists or encompasses the right of individuals then to make that decision as laid out by *Roe* v. *Wade*?

Judge BENITEZ. I believe that *Roe* v. *Wade* is, in fact, the law of the land, and I will definitely follow *Roe* v. *Wade*.

Senator FEINSTEIN. Thank you.

Here is another one. In a September 2001 case, *U.S.* v. *Alvarez-Texta*, you issued an order for the defense attorney to show cause why he shouldn't be held in contempt of the court after he failed to appear for two criminal court cases. Can you tell us why you believe this order was necessary? And can you describe your views on using the court's contempt powers? Should they be used often or sparingly?

Judge BENITEZ. Thank you, Senator. I am glad you asked that question because in six and a half years on the bench, I have never held a lawyer in contempt. I have threatened to hold a lawyer in contempt once, and that was the case.

What happened in that case, Senator, was that at the initial preliminary hearing, the lawyer who had been appointed to the case was not able to attend. We did not know why, but he was not able to attend. He asked a second lawyer to appear on his behalf. It was going to be a relatively routine matter, but what happened was that when I asked the defendant whether he would agree to the continuance, he contradicted the lawyer that had been sent to appear for the first attorney. And he said that, no, he did not want his preliminary hearing continued.

And, Senator, as you know, the preliminary hearing, the right to a preliminary hearing is the right of the defendant and not of the attorney. And so at that point in time, I was faced with a situation where I had a lawyer who was saying that he wanted to continue the preliminary hearing, but the client did not.

Over his objection, I went ahead and continued it anyway because the Government was not ready to proceed and, frankly, neither was the court because we had not allotted time for an evidentiary hearing.

At the second hearing, when I continued the case, a different lawyer, that is, a third lawyer showed up for that hearing. Again, that lawyer was not prepared to go forward with the preliminary hearing.

Now, Senator, very important and valuable rights are at stake. A defendant is in custody. Time is marching on, and that defendant has a right to have a preliminary hearing. In addition, in the Southern District it is customary for a disposition, if it going to be agreed upon, to be agreed upon prior to an indictment being issued.

Generally once an indictment is issued, the disposition is going to change considerably.

I felt that it was important that this defendant have the attorney that had been appointed to represent him to be there. So what I did is I indicated that I would issue an order to show cause for the attorney to be there the next day or show cause why he should not be held in contempt.

Now, Senator, subsequent to that, I received a phone call from the attorney. The attorney gave me a perfectly valid explanation why he could not be there. He apologized for not being able to be there. He told me that the problem was going to be resolved in a particular way. In fact, we did have that hearing the third time. That would be the third hearing in the case. A fourth lawyer showed up specially appearing for the attorney that had originally been appointed. We did, in fact, resolve the problem. The case was dismissed and refiled.

And, Senator, perhaps as a footnote, I should state that when I appointed a lawyer to the new case that was filed, I reappointed that same lawyer that I had previously ordered to show cause.

So as I said, in six and a half years, I have never held a lawyer in contempt, and this is the only time that I can recall ever threatening to hold a lawyer in contempt.

Senator FEINSTEIN. Thank you. I think that sets the record straight.

Do you have any sense of why the Bar Association came up with the finding they did?

Judge BENITEZ. Senator, I know that the American Bar Association has a difficult task at hand, and I know that they do investigations and they come up with their conclusions. And I'm really not in a position to speculate or to second-guess.

Perhaps it may be that some of the attorneys that were contacted were not attorneys that regularly appear in my court. Maybe they don't really know me as well. It may be a geographic factor. I really don't know, Senator. It would be sheer speculation on my part.

Senator FEINSTEIN. Well, that really—well, let me ask one other question, because with a district court it is always a question of dockets and handling dockets. And you have handled so many preliminary hearings at one time, nearly 1,500 in a short period of time. How do you do that? And would you continue that same process as a district court judge?

Judge BENITEZ. Well, Senator, thank you for asking that question. We have established in El Centro what I think is a fairly efficient, cooperative effort on the part of everyone—the attorneys, the agencies that we work with, and the court staff, of course. And that allows us to be able to move through cases pretty quickly while yet allowing time for the parties to express their issues and to fully brief them and argue them if they feel like it's something that they need to do. But it is more of a system that we have set up, again, partly because of the unique geographic location that we have and partly because of the number of cases that we have and the nature of the cases that we have.

I think that in the past when I was on the Superior Court bench, I think, I hope, that I had a reputation for being able to manage my calendar efficiently and quickly. And as was pointed out, it was

not unusual for me when I was on the Superior Court bench, if I finished my calendar, to ask another judge if perhaps I could help him or her with the calendar.

Senator FEINSTEIN. Thank you very much.

I have just received a note that there is about 60 seconds left on the vote, so I am going to enter into the record a statement by the ranking member, Senator Leahy, and recess the Committee for a short time. And Senator Hatch, the Chairman, will be back very shortly.

Judge BENITEZ. Thank you, Senator.

Senator FEINSTEIN. Thank you very much.

[Recess 10:45 to 10:56 a.m.]

Chairman HATCH. Well, if we can resume the hearing.

Judge Benitez, before I begin with my questions for you, I would like to make a note of sentiment. I expressed during a hearing on Judge Alexander Williams—he was a Clinton district court nominee who received a rating of "Not Qualified" from a substantial majority of the ABA Standing Committee and who we nevertheless confirmed as a district court judge for the District of Maryland.

Now, during the hearing I told Judge Williams, "I am aware of the letter from the ABA, and I just want to assure you that I do not treat the ABA's findings on nominees as the last word, although I have to say that I think they are trying to do the best job they can."

Now, I feel the same way today as I did back in 1994. And Judge Williams has proven to be an adequate and good judge, even though there was some strong feeling that maybe he would not be.

In your case, I do have strong disagreements, at least from what I know today, with the ABA's vote based on my review of your record.

Now, is it correct that you were selected by a bipartisan Committee to serve as U.S. magistrate judge? This is a position which you have held since the year 2001.

Judge BENITEZ. That is true, Senator. Before I was selected, I was screened by a bipartisan selection merit Committee that is established pursuant to Federal law.

Chairman HATCH. Is it also correct that you were found highly qualified by a bipartisan nominating Committee and unanimously recommended by that commission to be appointed to the U.S. District Court for the Southern District of California?

Judge BENITEZ. Thank you, Senator. I believe that is true.

Chairman HATCH. Do you have any thoughts of whether or not either of these two commissions could have found you not qualified and still nominated you to these prestigious positions?

Judge BENITEZ. Senator, that would probably call for some speculation on my part, but I would think probably not.

Chairman HATCH. Okay. Now, your home town paper, the Imperial Valley Press, said this about your nomination: "It would be hard for even the ABA to dispute that Benitez has a fine legal career. He flourished in private practice in El Centro, was appointed to an Imperial County Superior Court judgeship where he did well, and in recent years excelled as a Federal magistrate in Imperial County, handling a tremendous workload. To us and many, many others, Benitez seems more than qualified for a Federal judgeship."

Now, from what I see I agree with that assessment, Judge Benitez. You overcame significant obstacles to work your way through school, establishing a thriving legal practice, and you have significant experience in the judiciary. Would you please tell the Committee how your background has prepared you to be a Federal trial judge?

Judge BENITEZ. Thank you, Senator. I started out as a private practitioner. I practiced law in a broad spectrum of cases. I practiced law in numerous counties, several States over the years, and I have experienced an awful lot of proceedings and cases and sat before many, many, many judges. And I have had an opportunity to observe them and how they work.

I was appointed to the Superior Court bench in 1997. There I presided over a significant State calendar, including assisting in setting up a domestic violence calendar for Imperial County. I tried several major felonies. I presided over what we used to call the jail court, which was a really hectic calendar where we handled preliminary hearings, pleas, probation violations, and we did it all in 1 day.

As I said, I tried several major felonies, and I'm pleased to say, Senator, that none of the cases that I ever tried were ever reversed, nor was there a writ of habeas corpus granted on any of those cases.

Subsequently, I was appointed to be the magistrate judge. Again, I have seen the Federal court system from I guess what you would say the inception of the case. I've seen how the cases move along the system.

Personally, Senator, as you know, I was born in Cuba. I came to the United States in 1961. When I arrived in the United States, I could not speak English. I worked my way through school, and I believe that as an immigrant, someone who came to this country, I have a certain degree of empathy for people who have had similar backgrounds.

I think all of that assists me in being able to reach what I hope are good judgments about people and good judgments about cases and to determine what the law is and to determine what the issues are and to be able to sort through all of that in order to come up with a fair and just decision.

Chairman HATCH. Well, you have been active in community and civic affairs throughout your career. Would you care to highlight some of your contributions in the area of assisting disadvantaged youth, for instance?

Judge BENITEZ. Well, thank you, Senator. I have been very active in the community. I have long been a believer that you have to give back more than you have taken. And so I started out—shortly after getting out of law school, I became very involved in youth soccer associations. I put together a traveling team. I put together kids who tried out for the Olympic development program. Many, if not most, of those kids were disadvantaged kids, mostly Hispanic kids.

I was very involved in youth swimming over the years. I was president of the swim club. Again, many of the kids in that program were disadvantaged kids.

I was very much involved in the high school mock trial program put on by the Constitutional Rights Foundation. I have been in-

volved in that program, in fact, I just finished a weekend of involvement in that program just last weekend. Again, many of those kids are kids that come from disadvantaged homes. They get quite an exposure to the legal system, to how our justice system works, and I think it's a terrific opportunity for them to learn about our system.

Not necessarily involved with youth, but I was appointed to the Planning Commission of our city and sat as the Chairman of that Planning Commission for one term, served on the commission for two terms. I was appointed by the board of supervisors of the county to serve on the board of directors of the Private Industry Council, which is an organization that administers and oversees funding under the Job Training Partnership Act, which is an act enacted by the Congress of the United States.

I was a member of the Bioethics Committee of the local community hospital and served in that position for many, many years, and as was stated earlier, I was a member of the DeAnza Search and Rescue Unit, which is a volunteer organization that essentially calls upon us to spend numerous hours, whether it be hot or cold outside, searching for and rescuing people that are distressed in Imperial County, Riverside, and in Mexico.

Chairman HATCH. Well, thank you. You know, there have been some criticisms of your temperament. Do you have any comments about that?

Judge BENITEZ. Well, Senator, I—I try, I try my best to be the best person that I can be, and sometimes that may not be good enough. And there are people who may misinterpret or misconstrue something that I say or something that I do. But I assure you, I have always been a believer in the Golden Rule. I believe that people are entitled to be treated the way you would want to be treated. And I have adhered to that rule. Being face to face with people that have been charged with the most horrible crimes—murder, rape, child molestation—notwithstanding their position or their situation in life, I believe that it is important that people be treated with respect and with dignity. And I hope to be able to do that if I'm fortunate enough to be confirmed.

Chairman HATCH. Well, you know, some people worry because, having tried a lot of cases in Federal court myself, I spent a lot of time there myself, the closest thing to godhood in this life is a Federal district court judge, as you know. And some really believe it. And Utah has had a very checkered reputation from time to time with Willis Ritter and a few others who have been pretty tough when it comes to temperament, although I always got along well with him. But to make a long story short, Judge Benitez, I believe that the Committee is going to confirm you and send you to the floor and confirm you on the floor. But I suggest to you that should that happen, it is very, very important not to try the attorneys' cases for them, to help younger lawyers if they are having difficulty with evidentiary rules or other problems in the courthouse, and to basically have a good judicial temperament so that people who try these very difficult cases at least do not have to contend with an officious judge. And all I can say is, from what I know about you, you should be able to do that going away.

So we are grateful to have you here, and with that, it has been a pretty easy set of questions for you. I don't know what Senator Feinstein asked you, but I think she feels along the same lines as I do. So we will just let you take your seat, and then we will turn to the ABA and hear what they have to say.

Judge BENITEZ. Thank you, Mr. Chairman.

Chairman HATCH. Now, if at any time you feel that you would like to respond to the ABA, I would be happy to recall you as a witness. Is that okay?

Judge BENITEZ. That's fine. Thank you, Mr. Chairman.

Chairman HATCH. Okay. Thank you.

Chairman HATCH. Let me call the ABA, Tom Hayward, who is the Chair of the ABA Standing Committee on the Federal Judiciary, and Richard Macias, who is the ABA Standing Committee circuit investigator. So we are happy and honored to have both of you here.

If you will, we will turn to you, Mr. Hayward, and then we will turn to you, Mr. Macias, and go from there.

STATEMENTS OF THOMAS Z. HAYWARD, JR., CHAIR, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON FEDERAL JUDICIARY, AND RICHARD M. MACIAS, CIRCUIT INVESTIGATOR

Mr. HAYWARD. Thank you, Mr. Chairman and members of the Committee. My name is Thomas Z. Hayward, Jr. I am a practicing lawyer in Chicago, and I am the Chair of the American Bar Association's Standing Committee on the Federal Judiciary. With me today is Richard M. Macias, a former member of our committee, and circuit member for this investigation. We appear here to present the views of the association on the nomination of Roger T. Benitez to be a United States District Court Judge for the Southern District of California. After careful investigation and consideration of his professional qualifications, a substantial majority of our Committee is of the opinion that the nominee is "Not Qualified" for the appointment. A minority found him to be "Qualified."

Before discussing the specifics of this case, I would like to review briefly the committee's procedures so that you have a clear understanding of the process the Committee followed in this investigation. A more detailed description of the committee's procedures is contained in the committee's booklet entitled "Standing Committee on Federal Judiciary: What It is and How It Works."

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee—his or her competence, integrity, and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough, and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law, breadth of professional experience, character, integrity, compassion, courtesy, open-mindedness, patience, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, al-

though it may be conducted by another member or former member. In the current case, Mr. Macias, in his capacity as a former member for the Ninth Circuit, was asked to undertake this investigation because the current Committee member from the Ninth Circuit was already undertaking another investigation.

The investigator starts his investigation by reviewing the candidate's responses to the public portion of the Senate Judiciary Committee questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualification, such as professional experience, significant cases handled, and major writings. The circuit member makes extensive use of this questionnaire during the course of the investigation. In addition, the circuit member examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence, and judicial temperament of the nominee, including, where pertinent, Federal and State judges, practicing lawyers in both private and Government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the circuit member will advise the nominee of such information if he or she can do without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching the confidentiality, the investigator will not use that information in writing the formal report and the committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the circuit member takes whatever additional steps are necessary to reach a fair and accurate assessment of the nominee.

Upon completion of the investigation, the circuit member submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the circuit member then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted—including the interview with the nominee—and an evaluation of the candidate's professional qualifications. This formal report, together with the public portions of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire 15-person committee. After carefully considering the formal report and its attachments, each member submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified," or "Not Qualified."

I would like to emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Com-

mittee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the committee, unless they consent to disclosure or the information is so well known to the community that it has been repeated to the Committee members by multiple sources. It is the committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given full opportunity to explain the matter and to provide any additional information bearing on it. If the information cannot be shared with the nominee, the information is not included in the formal report and, I repeat, is not considered by the Committee in reaching its evaluation.

Now, turning to the investigation of Judge Benitez, Magistrate Judge Benitez was nominated on May 1, 2003. Carol Dinkins of Houston, Texas, who was then Chair of the Standing Committee, assigned Mr. Macias to the investigation, as I previously explained. He began his investigation shortly after receiving the nominee's May 21, 2003, responses to the public portion of the Senate Judiciary Committee questionnaire. The investigation took longer to complete than most investigations because negative information about the nominee's professional qualifications was uncovered.

On July 22, 2003, Mr. Macias submitted to Chair Dinkins an informal report of the results of his investigation, including summaries of all of his confidential interviews and a description of his interview with the nominee. Because the report contained information adverse to the nominee, Chair Dinkins asked Mr. Macias to conduct additional interviews with both lawyers and judges to assure that the concerns expressed in the report were reflective of the views of a very broad spectrum of individuals who had knowledge of the professional qualifications of the nominee. On October 10, 2003, Mr. Macias' formal report was transmitted to all members of the committee. Those who had questions were encouraged to contact Mr. Macias directly. After all of the Committee members had an opportunity to study the report and all the attachments, each member reported his or her vote regarding the rating of the nominee to the Chair. A substantial majority of the Committee found the nominee "Not Qualified" and a minority found him "Qualified." This vote was reported to you, Mr. Chairman, on October 21, 2003.

I would now ask my colleague, Mr. Macias, to describe the investigation of the nominee.

Mr. MACIAS. Mr. Chairman, my name is Richard M. Macias. I am an attorney from California and, as Mr. Hayward indicated, I am a former member of the committee. I served a full term on the Committee starting in 1994 and have provided frequent assistance on an as-needed basis since then. I have personally conducted approximately 60 investigations for the Committee and have reviewed many more reports prepared by other Committee members.

In 2003, I was asked to undertake the investigation of the qualifications of Roger T. Benitez to serve as a United States district judge. My investigation was conducted in the same manner all investigations by the Standing Committee are conducted, as Thomas Hayward just explained.

My investigation took place during the summer of 2003. In addition to carefully reviewing pertinent materials, such as the nominee's responses to the questionnaire, his legal writings, and other documents that he sent me to review, my investigation of the professional qualifications of Judge Benitez included approximately 67 confidential interviews with members of his legal community, including 23 judges and 44 lawyers. During each conversation, I asked how the person knew the nominee and what the person knew about the nominee's professional competence, judicial temperament, and integrity that would bear on his competence to a be a United States district judge. I interviewed almost all—if not all—of the district court judges and magistrate judges of the Southern District of California and the Imperial County Superior Court judges. I also made a particular effort to locate and speak with attorneys who had made court appearances before the nominee.

I also met privately with the nominee in his office in El Centro on two separate occasions. During our meetings, each of the many concerns over Judge Benitez's qualifications that had been raised during my investigation was discussed, and the nominee was given a full opportunity to respond to and rebut the adverse information and to provide any other additional data, information, or materials that he wished me to consider. Because I received more negative comments concerning this nominee than I had ever received about any other person I have investigated, I met with Judge Benitez twice and spent considerably longer conferring with him than what is normally required.

A substantial number of the judges and lawyers I interviewed raised significant concerns about Judge Benitez's judicial temperament and his courtroom demeanor. Many of the interviewees were initially reluctant to discuss the nominee until I assured them that everything they told me would be held in the strictest confidence. Over the past 10 years, I have conducted many investigations for the Southern District of California and, fortunately, I have established a reputation as someone who keeps his word and can be trusted to keep matters confidential when asked to do so.

The lawyers with whom I spoke were civil and criminal practitioners, both prosecutors and defense lawyers, from San Diego and Imperial County, where Judge Benitez practiced law from 1979 to 1997, sat as an Imperial County Superior Court judge from 1997 to 2001, and has served as a Federal magistrate judge for the Southern District of California from 2001 to the present.

Over and over I received negative comments regarding Judge Benitez's judicial temperament. Interviewees repeatedly told me that Judge Benitez displays inappropriate judicial temperament with lawyers, litigants, and judicial colleagues, that all too frequently, while on the bench, Judge Benitez is arrogant, pompous, condescending, impatient, short-tempered, rude, insulting, bullying, unnecessarily mean, and altogether lacking in people skills.

Interestingly, a significant number of judges and lawyers with whom I spoke specifically reported that Judge Benitez would often become irrationally upset and outraged if an attorney who had been appointed to represent a defendant had a scheduling conflict and asked another equally competent and prepared attorney to appear before the nominee on behalf of the defendant. Scheduling

conflicts are a fact of life for litigators; they are a common, everyday occurrence. The people who specifically mentioned this behavior as one example of the nominee's injudicious temperament assured me that almost no other magistrate judge in California or Arizona would be the least bit perturbed under similar circumstances.

A number of people with whom I spoke expressed grave doubts over Judge Benitez's ability to competently handle the more demanding docket caseload of a Federal district judge and efficiently manage a district courtroom, based on their perception of his very slow and rigid manner of handling his current court calendar in El Centro.

Based on their exposure to the nominee's mode of relating professionally to others in his official capacity as a judge, interviewees expressed doubt over Judge Benitez's ability to become an accommodating and collegial member of the Federal district court.

Many of the interviewees further expressed the sentiment that the nominee's temperament problems are compounded by the fact that Judge Benitez fails to appreciate the depth of concern by the bench and bar regarding his temperament and has not demonstrated that he is willing or able to address these concerns.

I discussed each of the negative comments I received with Judge Benitez when I interviewed him in person. His response was to consistently deny the accuracy of what I had been told. He was unable to explain why so many people would make incorrect, negative comments about him. Frankly, in light of the substantial number of negative comments brought to Judge Benitez's attention, we would have hoped he might have responded that he had not fully appreciated how he was perceived by others and that he would strive to markedly improve his temperament and demeanor. No such conciliatory comments were forthcoming from the nominee.

Our Committee members, after reviewing my report on the nominee, were particularly concerned about the clear, consistent pattern to the criticisms that emerged from the interviews. A substantial number of Judge Benitez's professional peers that I interviewed complained about his lack of interpersonal skills and were deeply concerned that he lacked the judicial temperament essential for a district court judge. My colleagues on the Committee were not dissuaded over the seriousness of these allegations by the fact that I reported that I interviewed some lawyers who told me that they had not encountered any problems when they had appeared before Judge Benitez.

After careful consideration of my report, a substantial majority of the Committee was of the view that Judge Benitez is "Not Qualified" for a life-tenured appointment to the district court. A minority of the Committee found him to be "Qualified."

Our Committee takes most seriously its responsibility to conduct an independent peer evaluation of the professional qualifications of judicial nominees. There is no simple formula that we can apply to determine if a nominee is "Well Qualified," "Qualified," or "Not Qualified." Our recommendation is not the result of tallying the positive and negative comments we receive about a particular nominee or giving an assigned weight to other factors that bear upon professional competence. Rather, in making our evaluation,

we draw upon our own professional experience, the cumulative experience of the Standing Committee as a whole, the information and knowledge we gain about the nominee during the course of the investigation, and our independent judgment. We do our utmost to impartially apply the same standards and criteria to every nominee, and we take our job very seriously, especially when, like today, we have negative information to report about the professional qualifications of a nominee for a lifetime appointment to the Federal bench.

Thank you for the opportunity to appear before you today. Tom Hayward and I stand ready to respond to any questions you might have.

Chairman HATCH. Well, thank you so much. I appreciate the hard work that the Standing Committee does and that the investigators do. It is a lot of work, it is a lot of effort, and we appreciate the work that you put in.

We have to weigh these things and balance them, and like I say, we have a lot of letters, a lot of information from people who know the judge very well who think he is terrific for this position. So it is no reflection on the ABA if we decide to ignore your recommendations. And it is no reflection sometimes on the nominee if we decide to accept your recommendations. So it is a tough decision sometimes,

Mr. Hayward, I particularly appreciate you and the work that you do. I know it is a lot of work. I know it takes a lot of time. Sometimes there is not much thanks for doing what you do, and many times you are a political football kicked around by this Committee. We know that has been the case in the past, and we hope that somehow or other I think we have come a long way from those days when there really was, in my opinion, some politics on the Committee.

Mr. HAYWARD. Thank you, Mr. Chairman, and I agree with that observation.

Chairman HATCH. And I think you have done an excellent job, and I appreciate your presence today to answer questions from the Committee regarding the ABA's evaluation of Judge Benitez's nomination. But let me just ask some basic questions so we all understand this a little bit better regarding procedures followed by the Standing Committee.

Now, it is my understanding that one investigator is initially assigned to a particular nomination.

Mr. HAYWARD. Yes.

Chairman HATCH. However, there may be cases where a second investigator joins the case. For example, a second investigator may be appointed where it appears at any time during the evaluation process that the nominee may receive a "Not Qualified" rating. I think that is correct.

Mr. HAYWARD. Yes.

Chairman HATCH. What was the thinking regarding a second investigator in this case?

Mr. HAYWARD. My judgment as Chair when I received the first informal report and we asked Mr. Macias to do additional investigation, that if it had been a close call, Mr. Chairman, in terms of review of the report, I most certainly—and always do, as my

predecessors have—appoint a second investigator. In this case, the finding as recommended to your Committee, sir, was a substantial majority found the nominee not qualified. It was on that basis that we asked, after Mr. Macias had gone back a second time, done additional interviews, talked with the nominee, that I reviewed his report, made the judgment that the trend in the report was so strong in terms of our finding that a second investigator would not change that report and, accordingly, authorized the formal report to go forward to our Committee and for the Committee to make its recommendation on the basis of that report.

Chairman HATCH. In the case of Judge Benitez, that was a split report, as you say. You say a substantial majority of the committee.

Mr. HAYWARD. Right.

Chairman HATCH. Is there a way of quantifying that?

Mr. HAYWARD. Yes, sir. As you know, including myself, there are 15 persons on the committee. A substantial majority is more than 10, and in this particular case, the Chair does not vote unless there is a tie. I did not vote, so 14 members of the Committee voted and 10 or more found the nominee not qualified.

Chairman HATCH. Now, it is clear that Judge Benitez enjoys widespread support from his colleagues and peers from what has come to us.

Mr. HAYWARD. Right.

Chairman HATCH. And as you know, in 1997 he was appointed to the Superior Court of Imperial County by the then Governor of the State of California.

Now, prior to his nomination, he was vetted by the Judicial Nomination Evaluation Committee of the State of California, and as part of that evaluation, confidential questionnaires were sent out to 150 lawyers and judges asking for information concerning his legal ability, ethics, and temperament. Now, that Committee found him to be qualified to be a judge, and in his present nomination, Judge Benitez was also found to be highly qualified by a bipartisan nominating commission tasked with selecting exemplary candidates for service on the Federal bench.

Now, that Committee unanimously recommended Judge Benitez for this position, and 3 years previous to that recommendation, he was selected by another bipartisan commission to serve as a magistrate judge after a thorough review of his record and experience.

Now, Judge Benitez's nomination is unanimously supported by the board of directors of the Imperial County Bar Association. He has the support of all 12 active judges of the Southern District of California and the support of the presiding judge of Imperial County, Mr. Raymond Cota, Judge Raymond Cota. And they all agree he is qualified. The only evidence we have that he is not qualified are the anonymous comments of his detractors as reported by your Committee without specifics.

Now, I think naturally a question that needs to be asked is: Do you have any real explanation why the ABA rating is so inconsistent with other commission findings and the endorsements in favor of Judge Benitez?

Mr. HAYWARD. I think my answer, Mr. Chair, in all due respect to the individuals who have sent those recommendations to the Committee directly or those findings, is that the job that the Amer-

ican Bar Association's Standing Committee undertakes on behalf of this Committee is to provide this Committee with a peer review. The peer review consists of three legs: temperament, professional competence, and temperament—integrity, temperament, and professional competence.

We had no problem in evaluating this nominee with respect to two of those criteria—integrity and professional competence. We provide this Committee with our independent review. Remember, except for the investigator, all of the members of our Committee are distinguished practicing lawyers from around the country representing each of the circuits who have read hundreds of evaluations, undertaken hundreds of evaluations, that we provide this Committee and you, Mr. Chairman, with our best judgment, our best call. And you are right, Mr. Chairman, there are many other considerations that go into your nomination and confirmation of a nominee.

What we try to do as a Committee advising the Senate Judiciary Committee is make the call as I have described in my testimony, as Mr. Macias has described in his testimony, and, unfortunately, in this particular case, it does not comport with the many recommendations that you have from distinguished Chief Judge Marilyn Huff through other members of the bar. But I give this Committee and the Chair my assurance as Chair, having carefully reviewed Mr. Macias' report, that it was balanced, that it was not a close call in this particular incidence, and the best explanation I can give you, Mr. Chairman, is over the years that we have been doing this, since early in the Eisenhower administration, but certainly as the Chair indicated, over the last few years, we enjoy the confidence of the people that we are dealing with that they may open up to us in a manner that they may not open up to others that are more local, that are doing the investigation. And with the assurance of confidentiality, we call them as we see them.

Chairman HATCH. I understand that and I appreciate it. And I have no doubt, Mr. Macias, that you are a well-informed, decent investigation who is just trying to do the best you can. And if people report this to you, you have got to report it back.

I am also aware that there are a lot of—in some of these instances, there could be enemies and there could be people who can cause troubles to a nominee who aren't as honest as they should be. So it is something we have to weigh, but it is a matter of great concern to me. It is tough to do your job, and I respect people like yourself who have to do this job.

Well, we want to thank both of you for being here.

Mr. HAYWARD. I would just like to underline, Mr. Chairman, along your last comments, if I could, with all due respect, that if we do receive an adverse comment, I just want to re-emphasize that unless we can tell the nominee about it in general so the nominee has an ability to respond to our investigator, we reject it, we discount it. So if there is any incident where somebody just is trying to poison the well, so to speak, we pick that out.

Chairman HATCH. I believe that.

Mr. HAYWARD. And if it is a one-off type criticism, such as Senator Feinstein indicated, we also look into that, and that doesn't sway our recommendation one way or another.

Chairman HATCH. Well, as you know, we on this Committee sometimes have done lousy decisionmaking with regard to judges. So we are not going to blame you guys for doing the best you possibly can, and you are one element of this consideration. And you have been honest in admitting that we have many other elements we have to consider. And should we confirm Judge Benitez, we don't want the ABA to think that we are just rejecting your recommendations, but that we have taken them into consideration, and we certainly will. I mean, we respect you and we respect what you are doing, and we will do our best on the Committee.

Mr. HAYWARD. Mr. Chairman, thank you for those comments, and on behalf of the American Bar Association and my committee, I would say to you, Mr. Chairman, that all the members of the Judiciary Committee thank you for the confidence that you place in us each time a nomination comes forward, that we will do the peer review and provide you with our best advice concerning that particular nomination.

Chairman HATCH. Well, thank you, Mr. Hayward. Thank you, Mr. Macias.

Mr. MACIAS. Thank you, Mr. Chairman.

Chairman HATCH. We appreciate having your input.

Chairman HATCH. Now we are going to call on Judge Huff at this point for any comments that she would care to make one way or the other, and then we will—unless, Judge Benitez, do you need to make any further comments? We would be happy to—let the judge sit in the middle, and you can use this one over here.

Judge BENITEZ. Mr. Chairman, let me just say this: I, too, think that the ABA has a difficult task at hand. I appreciate the work that they have put into their investigation. I wish that the outcome would have been different. I wish I could definitively find out how we can have the two conflicting versions of who I am, but I can't. And anything that I would say would be speculation.

All I can say is this: Obviously there is a problem, or at least it is a perceived problem. And if given the opportunity to serve as a district judge, I will certainly attempt to address those issues that have been raised by the ABA.

Chairman HATCH. Well, thank you. I appreciate that.

Judge BENITEZ. Thank you, Mr. Chairman.

Chairman HATCH. Judge Huff, we will take your statement. We are honored that you would take time to come back here, and I think it is a tribute to Judge Benitez that you would take the time to be with us.

STATEMENT OF HON. MARILYN L. HUFF, CHIEF JUDGE, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Judge HUFF. Thank you. I had to recess a death penalty case to come here, but I did believe that it was important.

I favor the confirmation of Roger Benitez as a district judge, as do significantly all of my active district judge colleagues on the bench, as we believe that he does have the skills and judicial temperament to help us with our heavy caseload. My written testimony has been submitted for the record.

Chairman HATCH. We will put it in the record.

Judge HUFF. So I will summarize, then, my comments with respect to Magistrate Judge Benitez.

I think it is significant to know and thank Senator Feinstein for setting up the bipartisan merit selection committee. That committee, after significant investigation at the local level, with knowledge of the lawyers and judges who were speaking, unanimously recommended Roger Benitez for one of these positions to help us with our heavy caseload.

At the same time, we as district judges of the court had appointed Magistrate Judge Benitez as a magistrate judge for Imperial County. Significantly, he was the first full-time magistrate judge in Imperial County, and the best way that I can reconcile the comments of the ABA with our different perceptions of Judge Benitez is I do attribute some of the criticism to the natural growing pains in setting up a new, functioning, and very busy court in a geographically distant community approximately 2 hours away from San Diego.

Magistrate Judge Benitez came to our attention based on the recommendations of a merit screening panel that consists of lawyers and community representatives. They forwarded his name as one of the five finalists for magistrate judge. We district judges then undertook our own due diligence, and significant to us was what kind of judicial temperament did Superior Court Judge Benitez possess. We learned that he possessed the attributes to be an excellent magistrate judge. He was diligent, resourceful, efficient, knowledgeable, and, most significantly for your consideration here today, compassionate, fair, and considerate.

Based on his excellent reputation, our interview, and the favorable results of his FBI and IRS background investigations, we appointed him as United States magistrate judge in January 2001.

As I said, we set up a new court. Previously, we had all defendants transferred to San Diego and didn't appoint counsel until, some days, 3 days later. When we took a look at the numbers, we realized that approximately 30 percent of the initial appearances were happening in Imperial County. Our Acting United States Marshal estimates that for the 3 years that Magistrate Judge Benitez has been on the bench, he has saved approximately $5.2 million for the United States Marshals Service over this 3-year period because they were able to house the prisoners in Imperial County rather than in the more expensive San Diego contract facilities.

We believe that Magistrate Judge Benitez has actually improved the quality of justice for indigent defendants in Imperial County. He set up a system that is functioning and works well, and, significantly, unquestionably he has been a diligent judge. His 4,524 initial appearances as of February 13 in Imperial County saved the court the repetition of these appearances in San Diego.

We have reviewed his work, and beyond his work ethic, he has demonstrated an ability to set up a functioning and successful divisional court. For example, in 2003, he handled 1,494 initial appearances for criminal cases. To put this in context, I took a look at the Northern District of California. They have ten magistrate judges. We have ten magistrate judges. Their ten magistrate judges collectively only handled 1,341 initial appearances, and Magistrate

Judge Benitez handled more than all ten of the district judges in the Northern District of California. And Judge Benitez took a look at the statistics and said that out of all of the districts in the United States that, except for five districts, he singlehandedly handled more initial appearances than any of them, the whole court combined. So he has been a very diligent worker.

He has, in the court's view, been an asset to the Federal bench. We have taken a look at the ABA criticism and taken a look at that significantly. I have attempted to parse through the information to try to find out if there are trends here. As chief judge, I would be concerned if there was a concern about judicial temperament.

As required by law, until the law recently changed, we were required to review transcripts of all guilty pleas taken by Magistrate Judge Benitez. So over the life that he has been there, for 3 years, we have had no criticism based on our review of the actual transcripts of his judicial temperament or compassionate quality. Indeed, to the opposite, we have found him to be a very wonderful and diligent Federal magistrate.

In sum, we do believe that he will make a positive contribution to the administration of justice in the Southern District of California and help us to reduce our heavy caseload. We believe he possesses the intellect, experience, and temperament to be an excellent district court judge. We also have the ability to broaden the diversity on our court because, as you have heard, he has a wonderful life story. He is the embodiment of the American dream. As an immigrant, he came to the United States with very little, and he has risen to become a very respected judge.

We were surprised and disappointed to learn that the ABA has a different view of his qualifications. While I deeply respect the ABA and its judicial evaluations process, in this case I am more persuaded by the unanimous recommendation of the bipartisan merit selection committee, the additional investigation done by David Casey at the request of Senator Feinstein—he is the president of the American Trial Lawyers Association—and the views of my fellow district court colleagues, the active judges, who collectively believe and support that Magistrate Judge Benitez will be an excellent district judge.

I am open to any questions you have.

Chairman HATCH. Well, thank you so much. I think it is a tremendous honor for Judge Benitez to have you take the time to come back and be with us and give what I consider to be very, very excellent testimony. It is a real tribute to you, Judge Benitez. And, look, I give weight to the ABA findings, but they are not always right, and I mentioned the Williams case just as a perfect illustration, an African-American nominee who was found not qualified by, I think everybody on that Standing Committee, and we just overruled them, and we find that he is doing an excellent job today.

In the case of Judge Benitez, I think you have come through a lot in your life, and I think that will redound very well to the benefit of those who appear before you. The only thing I can say is if there is any truth to any lack of temperament—and let me tell you, being a magistrate judge is not a walk in the park. You sometimes have to be firm. Just being a district court judge, you have to be firm. You cannot let lawyers walk all over you. And in this day and

age, lawyers tend to think they can do that to judges, even. And any time a judge settles them down, they take offense to it.

In my day, when I started out, we were very respectful in all ways to judges, and especially those who might not have temperament. But the fact of the matter is we know that there is a different segment of the whole Bar Association in various communities that doesn't always abide by the rules of decorum, and then they blame the judges for getting tough with them in the courtroom.

And, frankly, we understand that. We have become such a litigation-minded community throughout America that it has also become a community that is less reasonable than it should be. And I know that, Judge, you have experienced that as a district court judge, and nobody minds an advocate doing the very best he or she can in front of the court and raising very strong positions. But you do mind people who go way beyond where they should be, abuse the rules of evidence, and do other things that literally cause a judge, whether magistrate or district or even a circuit judge, to come down pretty hard on them. And we expect judges to come down hard from time to time.

So I would say, Judge Huff, that your testimony is the most significant testimony here today outside of Judge Benitez's, and it is very persuasive to me, as is Judge Benitez's testimony. And I am certainly going to recommend confirmation, and I believe this Committee will do so in spite of some of the tough times we have on this Committee from time to time. So we will do our very best to get you confirmed, and I would just suggest you be the very best judge you possibly can because you will bring credit to a lot of people outside of your family and your own immediate circumstances if you do a great job as a Federal district court judge. And I am going to count on your doing that.

Judge Huff, we are just very honored to have you here, and we respect you and respect the work that you do.

Judge HUFF. Thank you, and thank you so much for getting us the positions. We really do appreciate it.

Chairman HATCH. Thank you. We will do our best in the future, too.

[The prepared statement of Judge Huff appears as a submissions for the record.]

Chairman HATCH. Well, with that, we are going to recess until further notice.

[Whereupon, at 11:50 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
321 SOUTH WATERMAN AVE, SUITE 100
EL CENTRO, CALIFORNIA 92243

CHAMBERS OF
ROGER T. BENITEZ
MAGISTRATE JUDGE

PHONE:
(760) 353-1271
FAX: 353-9143

March 8, 2004

Hon. Orrin Hatch, United States Senator
Chairman, Senate Judiciary Committee
United States Senate
104 Hart Office Building
Washington, DC 20510

Re: **Responses to Written Follow-up Questions from Senator Richard Durbin**

Dear Chairman Hatch,

Enclosed are my Responses to Written Follow-up Questions from Senator Richard Durbin.

If you need additional information, please do not hesitate to contact me.

Sincerely,

Roger T. Benitez

CC: Hon. Patrick Leahy, United States Senator
Encls.

RESPONSES OF JUDGE ROGER T. BENITEZ TO WRITTEN FOLLOW-UP QUESTIONS FROM SENATOR RICHARD DURBIN
March 8, 2004

1. You may be aware from press accounts that the Senate Sergeant at Arms has conducted an investigation of the Senate Judiciary Committee and the incidents of theft of memos and other work products drafted by Democratic staff members of the Committee. It has been reported in the press and confirmed by the Sergeant at Arms that thousands of staff documents were stolen by Republican staff, and that the illegal activities took place over the past several months and perhaps years. At least one of the alleged perpetrators who used to work as Republican staff on this Committee has admitted publically that numerous documents that he stole related to judicial nominations. This former staff member was one of many Republican staff who handled judicial nominations for Chairman Hatch and subsequently for Majority Leader Frist. I'd like to ask you a series of questions concerning these unfortunate criminal incidents.

   A. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the Senate Judiciary Committee?

      Answer: No.

      If so, during those meetings, did any staff of the Senate Judiciary Committee share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources?

      Answer: Not applicable

      Did any staff of the Senate Judiciary Committee provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff?

      Answer: No.

      If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

      Answer: Not applicable

   B. In preparation for your confirmation hearing before the Senate

Responses of Roger T. Benitez to Written Follow-up Questions from Senator Richard Durbin
– Continued

Judiciary Committee, did you meet with any staff of the U.S. Department of Justice?

Answer: Yes.

If so, during those meetings, did any staff of the Justice Department share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources?

Answer: No.

Did any staff of the Justice Department provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff?

Answer: No.

If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer: Not applicable

C. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with any staff of the White House?

Answer: Yes.

If so, during those meetings, did any staff of the White House share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources?

Answer: No.

Did any staff of the White House provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff?

Responses of Roger T. Benitez to Written Follow-up Questions from Senator Richard Durbin
– Continued

Answer: No.

If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer: Not applicable

D. In preparation for your confirmation hearing before the Senate Judiciary Committee, did you meet with anyone associated with individuals, groups, or organizations outside of government that support, endorse, or advocate in any way on behalf of the confirmation of President bush's judicial nominees?

Answer: No.

If so, during those meetings, did any of these individuals, groups, or organizations, share, reference, or provide you with information that you were led to believe were obtained or derived from Democratic sources?

Answer: Not applicable

Did any of these individuals, groups, or organizations provide you any documents or excerpts from documents that appeared to you to have been drafted or prepared by Democratic staff?

Answer: Not applicable

If so, please explain the circumstances and what action, if any, you took in response to being presented with such information or documents.

Answer: Not applicable

2. The ABA's investigator, Richard Macias, testified that a "significant number of judges and lawyers with whom I spoke reported that Judge Benitez would often become irrationally upset and outraged if an attorney, who has been appointed to represent a defendant, had a scheduling conflict and asked another equally competent and prepared attorney to appear before the nominee."

Responses of Roger T. Benitez to Written Follow-up Questions from Senator Richard Durbin
– Continued

A. What is your response to that allegation?

Answer: I respectfully disagree with that characterization. The practice of one attorney appearing for another attorney is commonly referred to as making a special appearance. Because of our court's remote location, special appearances are the norm, not the exception. The judges of the Southern District of California and I encourage special appearances for the convenience of counsel and as a cost saving vehicle. On any given day I may have zero, or as many as eleven special appearances, six or seven being quite common. The court in El Centro would not be able to function as smoothly or as efficiently without the use of special appearances.

B. Have you ever raised your voice and yelled at a party in your courtroom?

Answer: Not that I can recall.

If so, please describe the circumstances.

Answer: Not applicable

3. The ABA has informed this Committee that you have a practice of limiting the number of guilty pleas that you accept on a given day. Is that accurate? If it is accurate, why is that your practice?

Answer: The number of pleas that I take on any given day is a function of how heavy the calendar is that day, the convenience of lawyers, whether a lawyer is from out of town and the limitations of my staff and other agencies such as the U.S. Marshal's Service. The El Centro court's calendar over the past three years included, but was not limited to, approximately 4,524 initial appearances and related matters. Last year alone I handled 1,494 initial appearances. In comparison, all ten magistrate judges in the Northern District of California heard 1,416 initial appearances. We function with very limited staff and resources. There is one judge, one courtroom deputy and one interpreter.

In the Southern District, guilty pleas are taken by magistrate judges following a standardized plea colloquy that complies with the requirements of Rule 11, Ninth Circuit precedent, and the directions of our district judges. It takes considerable time to go through that colloquy, particularly when the services of an interpreter are necessary. An overwhelming number of our cases in El Centro require the use of an interpreter. Most of that time is spent by the judge explaining to the

Responses of Roger T. Benitez to Written Follow-up Questions from Senator Richard Durbin
– Continued

defendant his or her rights, the nature and elements of the charges, the government's burden, explaining various portions of the plea agreement to the defendant, explaining the consequences of the plea and insuring that the plea is knowingly and voluntarily entered.

Given this court's high volume and limited resources, and in order for us to keep up with the volume and still be able to provide fair and equal access to justice for all, we run a structured, but not inflexible calendar. Our calendar was designed with the participation of our district judges, representatives from the United States Attorney's Office, the Federal Defender's Office and the Criminal Justice Act Panel. As part of our calendar management, pleas are generally taken at the end of the calendar. The reason for this is that it is better to keep a small number of lawyers and defendants waiting while we go through the rest of the calendar, rather than keep many lawyers and defendants waiting while we engage in the necessarily time consuming process of taking pleas. Consequently, by the time that we get to the pleas, it is towards the end of the day

Depending on the number of lawyers who express an interest in having their clients enter pleas on a given date, assuming that they are not already scheduled to plea that day, I will give the lawyers the option of either scheduling the plea for a different date or trailing the matter to the end of the calendar to see how many pleas we can take that day.

Are you aware of any other federal judges that have a similar practice?

Answer: Yes, there are several judges in our district who, as part of their calendar management, control the number of pleas that they will take on a given date.

4. Do you have any reason to believe that the ABA was biased against your nomination or did not make a good faith attempt to report on what it discovered in conducting interviews about your nomination?

Answer: I certainly respect the work that the ABA does, however I do not have sufficient information to answer this question.

Response of Richard Macias, ABA Standing Committee on Federal Judiciary
to
Questions from Senator Dick Dubin
Nomination Hearing of Judge Roger Benitez

March 14, 2004

Questions for ABA Witness Richard Macias

1. You testified that "a substantial majority of the judges and lawyers I interviewed raised significant concerns about Judge Benitez's judicial temperament and his courtroom demeanor." How many of the 23 judges with whom you spoke had significant concerns? How many of the 44 attorneys with whom you spoke had significant concerns?

Two thirds of the 67 persons interviewed raised concerns, including a majority of both lawyers and judges.

2. Without revealing the identities of the interviewees, please describe the specific concerns that each interviewee had about Judge Benitez and indicate whether the interviewee is a federal judge, state judge, or attorney. Please indicate whether the concerns were based on first-hand knowledge and observations, or on comments they had heard from others.

The specific concerns raised by those I interviewed are described in the submitted testimony. With rare exception, the comments were based on first-hand knowledge or observation. I do not believe it is possible to be more specific without potentially revealing the identities of the interviewees.

3. You testified that Judge Benitez is "arrogant, pompous, condescending, impatient, short-tempered, rude, insulting, bullying, unnecessarily mean, and altogether lacking in people skills." What specific examples did interviewees provide to illustrate these qualities?

Numerous people I interviewed made the sort of comments delineated in the testimony. I cannot provide specific illustrations without revealing the identities of those who provided me with illustrations.

4. You testified that Judge Benitez often becomes "irrationally upset and outraged if an attorney who had been appointed to represent a defendant had a scheduling conflict and asked another equally competent and prepared attorney to appear before the nominee." How many people mentioned that Judge Benitez engaged in this type of conduct? In what ways did he become "irrationally upset" and "outraged"? Did anyone indicate that he

raised his voice and yelled at litigants? If so, how frequently has he allegedly engaged in such conduct?

Numerous respondents described the behavior referred to here. The comments, by their nature, were primarily directed at attorneys but also on occasion at litigants. Even with a busy docket, a judge needs to keep himself in control and display patience and even temperament when managing the matters before him.

5. You testified that interviewees had "grave doubts about Judge Benitez's ability to competently handle the more demanding docket caseload of a federal district judge and efficiently manage a courtroom, based on their perception of his very slow and rigid manner of handling his current court calendar." What is the basis for this perception? Is Judge Benitez slower and more rigid than other magistrate judges in the Southern District of California? Please explain.

Judge Benitez was slower in scheduling matters (and in rendering decisions?) than other magistrate judges I, and those I interviewed, have appeared before him. The caseload in his court, in fairness, is greater than that of some other magistrate judges, but this is not sufficient to explain or justify the delays. For example, I noted (and you have alluded to this in question 8) that he would not schedule more than two guilty pleas on most days.

In addition, unlike every other magistrate in the Southern District of California, Judge Benitez does not handle any civil matters. As a district judge, he would be required, for the first time, to handle a full load of criminal and civil cases.

6. You testified that "Judge Benitez fails to appreciate the depth of concern by the bench and bar regarding his temperament and has not demonstrated that he is willing or able to address those concerns." What is the basis of this belief? What opportunity has he had to address the concerns that the ABA has raised?

As noted in my written statement on pages 7 and 9, I raised the issues with Judge Benitez in my two lengthy interview sessions. As I stated on page 9, "His response was to consistently deny the accuracy of what I had been told. He was unable to explain why so many people would make incorrect, negative comments about him. Frankly, in light of the substantial number of negative comments brought to Judge Benitez' attention, we would have hoped he might have responded that he had not fully appreciated how he was perceived by others and that he would strive to markedly improve his temperament and demeanor. No such conciliatory comments were forthcoming from the nominee." The first evidence of his acknowledging that there is a problem was at his nomination hearing. During one interview, he told me that he was not going to change his behavior "simply because I have been nominated."

7. Have there been any formal or informal complaints regarding judicial temperament or

courtroom demeanor filed against Judge Benitez, either when he was a state court judge or now as a U.S. Magistrate? If not, what conclusions if any can be drawn from that?

Information about any formal or informal complaints which may have been filed against Magistrate Judge Benitez under the Judicial Discipline and Disability Act of 1980 are not available for public inspection. The identity of the judicial officer who is the subject of the complaint is made part of the public record only if formal action, such as censure or reprimand, is taken against the judge. Formal findings of misconduct are rare, e.g. fewer than ten a year in the federal system nationwide. The absence of complaints would not be surprising, given the fact that lawyers must appear regularly before the same judge and that the adverse impact of inappropriate conduct can, on the merits, often be corrected on appeal.

Regarding Judge Benitez' short tenure on the state court bench, a similar system obtains. Complaints can become public only if they have been sustained after a formal hearing.

8. The ABA has informed this Committee that Judge Benitez has a practice of limiting the number of guilty pleas that he accepts on a given day. How many interviewees indicated to you that Judge Benitez had this practice? Is it an unusual practice among federal judges? Please explain.

Several lawyers reported this practice to me. It is highly unusual compared to most other federal judges, who will typically hear several matters in a day of the kind Judge Benitez has on his docket. Indeed, I was told that he should be able to handle as many as 20 guilty pleas a day, when the need arises.

9. Were the concerns expressed about Judge Benitez consistent over time? In your opinion, has he shown any signs of improvement?

The negative comments about Judge Benitez' temperament reflected a consistent pattern over the years up to the present time.

10. When asked at his hearing whether he had a sense of why the ABA gave him a rating of Not Qualified, Judge Benitez testified: "Perhaps it may be that some of the attorneys that were contacted were not attorneys that regularly appear in my court. Maybe they don't really know me as well. It may be a geographic factor." Please respond to these comments and indicate how many of the attorneys with whom you spoke regularly appear, or in the past regularly appeared, before Judge Benitez.

A large number of the attorneys I spoke with who made adverse comments are ones who have appeared multiple times before Judge Benitez.

11. You indicated in your testimony that you interviewed almost all of the district court judges of the Southern District of California and that "a substantial number of the judges

and lawyers I interviewed raised significant concerns about Judge Benitez's judicial temperament and his courtroom demeanor." Yet all the judges of the Southern District of California signed the testimony submitted to this Committee by Chief Judge Marilyn Huff endorsing Judge Benitez. What is your explanation of this paradox? Do you believe that some of the judges who signed on to Chief Judge Huff's testimony may have felt pressure to do so regardless of whether they agreed with its contents? Please explain.

As I noted in my answer to question 1, a majority of judges with whom I spoke voiced concerns. The Standing Committee has been conducting its confidential investigations for over 50 years and lawyers and judges familiar with the Standing Committee's work have confidence they can be very candid with us. I would not be able to comment on any written submissions by judges to your Committee.

12. At the Benitez hearing, Senator Hatch stated that with respect to nominees who receive ABA ratings of Not Qualified, "in some of these instances, there could be enemies and there could be people who can cause troubles to a nominee who aren't as honest as they should be." What is your response to that statement with respect to your investigation of Judge Benitez? Is it possible that Judge Benitez has enemies who were not honest with you? Please explain.

As we stated in our written testimony and at the hearing, we conduct our investigations in a confidential manner so as to elicit all possible information about the nominee. However, as also noted in Chairman Hayward's written statement on page 4 and in this response to questions posed by committee members during the hearing, "we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given full opportunity to explain the matter and to provide any additional information bearing on it. If the information cannot be shared with the nominee, the information is not included in the formal report and is not considered by the Committee in reaching its evaluation." Please recall that I spoke with state and federal, district and circuit and magistrate judges who had direct knowledge of the nominee. The statement was only signed by the district judges.

IMPERIAL COUNTY SHERIFF'S OFFICE
HAROLD D. CARTER
SHERIFF-CORONER-MARSHAL

Honorable Orrin G. Hatch
Chairman United States Senate
Committee On The Judiciary
104 Hart Senate Office Building
Washington D. C. 20510

Dear Senator Hatch,

I'm writing in support of the nomination of Federal Magistrate Roger Benitez to become a Federal District Court Judge. I currently serve as the elected Sheriff/Coroner of Imperial County and have been an active law enforcement officer in my county for the past thirty six years. In my career I have had the opportunity to work with a broad spectrum of the legal community and in my opinion Roger is one of the best attorneys and judges I have had the opportunity to work with. In addition to my work in law enforcement I have had the pleasure of serving with Roger on several service club projects and have found him to be a community minded concerned citizen who is willing to give back to his community.

Having had the opportunity to work with Roger and observe him from both a professional and personal stand point in my opinion you will not find a better qualified individual to serve the public on the Federal Bench than Roger. His experience in private practice and as a State Superior Court Judge along with his current work as a Federal Magistrate have prepared him to meet any challenges this new position will present.

Roger has an excellent reputation through out the community and has earned the respect of his peers and law enforcement. He is a hard working fair, honest and ethical jurist with a even judicial temperament who will issue intelligent rulings without fear or prejudice.

I urge your committee to confirm his appointment as soon as possible. The hard working men and women in law enforcement face serious problems with prosecutions in federal courts because of the lack of District Court Judges and Rogers confirmation will be a step in the right direction in securing justice for both our citizens and those arrested and charged with federal crimes.

Please feel free to contact me should you need any further information about this excellent nominee.

Sincerely
Harold D. Carter
Sheriff/Coroner/Marshal
Imperial County

P.O. Box 1040, El Centro, Ca. 92244-1040 / Phone (760) 339-6311 Fax (760) 339-6348
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WRITTEN TESTIMONY OF MATIAS R. CONTRERAS
SUPERIOR COURT JUDGE, STATE OF CALIFORNIA

FEBRUARY 25, 2004

HEARING FOR JUDGE ROGER BENITEZ BEFORE
THE SENATE COMMITTEE ON THE JUDICIARY

I have known Roger Benitez for over 25 years. I first met Roger when we were both practicing law in El Centro. He had just passed the Bar Exam and he struck me as a bright, energetic young lawyer. Within the next several years Roger and I became neighbors and I came to know him as a friend. I was very pleased to see Roger succeed as both a family man and lawyer during those years. He managed to balance a good family life and a successful law practice.

I was delighted when Roger was appointed to the Superior Court Bench in Imperial County. I knew he would make an excellent Judge. I was not disappointed. During his tenure as a Superior Court Judge he was a consummate "team player" and sought out extra work and assignments. I believe he was as highly regarded by the local members of the Bar Association as he was by his fellow judges. In a county where lawyers are more than willing to challenge a newly appointed judge at the first electoral opportunity, no one chose to run against Roger.

I have heard that Roger is doing an excellent job as a U.S. Magistrate Judge and I know he has the legal skills, talent and temperament to make an outstanding Federal District Court Judge.

Matt R. Cont

MATIAS R. CONTRERAS
Judge of the Superior Court

EZEKIEL E. CORTEZ
FEDERAL CRIMINAL DEFENSE ATTORNEY

December 17, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: United States District Court Candidate Roger T. Benitez

Dear Chairman Hatch:

I write regarding United States District Court Candidate Roger T. Benitez, currently sitting as United States Magistrate Judge in the Southern District of California. I feel compelled to write this letter because, while greeting the candidate at a professional function here, he told me details of *confidential* comments I had made regarding an experience I had in the judge's court. I had earlier made these and other comments under full assurances of confidentiality to Richard Macias, Federal Judiciary Committee, American Bar Association. The candidate himself also told me that my comments were among other instances involving him, now under review to determine his qualification.

Based upon my informal conversation with Judge Benitez, I now have reason to believe that the *confidential* comments I made to Mr. Macias may have been distorted and taken out of context. To insure the integrity of the process and fairness to the candidate, it is imperative that my *confidential* comments be evaluated as a whole and in the context and spirit in which I provided them. Unfortunately confidentiality has now become a casualty.

In the course of the background investigation into Judge Benitez's qualifications, Mr. Macias asked whether I had any negative or positive comment or experience connected to the candidate. Among other information, I provided the following:

1. I had an isolated negative experience with Judge Benitez when I was at the court of appeals in Pasadena, California at an oral argument when on the same day I had a routine appearance in one of my new cases then before Judge Benitez in El Centro, California. The Federal Defender assigned to the Judge's court agreed to appear for me and handle the routine continuance. Because the defendant in my case unexpectedly in open court refused to agree to the routine continuance he had earlier agreed to, I was later informed by the Judge's clerk that I would be held in contempt of court if I failed to personally appear at the next court appearance scheduled in the case. The matter was later resolved when I personally spoke with Judge Benitez and we both learned of all the specific circumstances connected to the particular incident. Thereafter, I appeared before Judge Benitez in several cases and the judge was very cordial and often appropriately humorous. With the exception of this isolated experience, I have not had any other negative experience in his courtroom;

PRACTICE EXCLUSIVELY DEVOTED TO FEDERAL CRIMINAL DEFENSE SINCE 1984
1010 SECOND AVENUE, SUITE 1850, SAN DIEGO, CA 92101
TEL: (619) 237-0309 FAX: (619) 237-8052
WWW.EZEKIELECORTEZ.COM EMAIL: LAWFORJUSTICE@AOL.COM

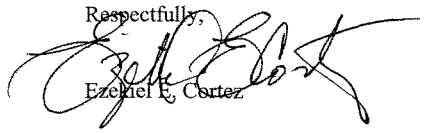
2. I also made it clear to Mr. Macias that I had been made aware of positive information about Judge Benitez's impartiality. One of the Federal Defenders permanently assigned to Judge Benitez's court informed me that the Judge was impartial on bail and sentencing matters and frequently granted the defendant's requests and that she perceived him as consistently impartial. She added that Judge Benitez rendered decisions and sentences based upon the individual facts of each case and not upon any perceived philosophical bias and that he was very efficient, yet meticulous, in his courtroom.

I stand by these comments.

Because my comments may have been distorted by the emphasis of only the isolated negative experience noted above, I felt it necessary to make the record clear and complete in this very important matter.

If you need any additional detail regarding this matter I am at your disposal. Thank you for your consideration.

Respectfully,



Ezekiel E. Cortez

Cc:
The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
The Honorable Dianne Feinstein
United States Senate
The Honorable Barbara Boxer
United States Senate

Raymond Ayala Cota
Judge

Superior Court of California
County of Imperial

939 Main Street
El Centro, CA 92243
Tel: (760) 482-4257
Fax: (760) 337-7742

February 23, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

I am submitting this statement as an endorsement of Roger Benitez for confirmation as federal court judge. If called to testify I would testify to the following:

I am a lifelong resident of Imperial County. I was raised and attended public schools in Calexico, California, a small border town of about 30,000 population about 120 miles east of San Diego. I received my law degree from the University of California, Berkeley campus (Boalt Hall) in 1976 and admitted to the California Bar the following year.

I began practicing in Imperial County about 1979, after spending two years in Santa Clara County. In 1996, I was elected to the bench. I am presently Presiding Judge of the Superior Court, for the County of Imperial, State of California.

Ours is a small community, with a countywide population of approximately 150,000 people. It's a close-knit legal community where it does not take long for the scuttlebutt on attorneys and judges to become quickly dispersed and their reputations secured, good or bad.

Accordingly, it was not long before I met Roger Benitez soon after my return to Imperial County. His family had escaped from Cuba's communist regime and settled in this area. Roger was raised, and attended local schools. After college, Roger became a long-term substitute teacher, and commuted to San Diego, studying for his law degree, and thereafter began the practice of law full time.

Throughout the years Roger built a solid reputation as an effective and smart attorney in the civil arena. While my practice was limited almost exclusively in the criminal field, and our legal paths did not cross too often, it became widespread knowledge in the legal community that Roger Benitez was considered to be one of the best local attorneys in his field.

About 1997, Roger was appointed to the bench, and served, mostly as a Superior Court Judge in Imperial County, until his resignation January 1, 2001 to assume his appointment as a

federal magistrate. It was during this time that I had the opportunity to witness first hand Judge Benitez' manner and mien, on the bench. As fellow judges we had weekly meetings to discuss court business. Practically a week did not go by without me having some contact with Judge Benitez.

Never, in 25 years as an attorney and judge in Imperial County, have I ever heard any unflattering remarks or criticism of Roger Benitez of any sort. A recent article appeared in a San Diego newspaper reporting that the ABA recently rated Judge Benitez "unqualified" for the position of federal court judge, and alleged sources accusing Judge Benitez of being "brusque," or lacking proper judicial temperament.

For over 25 years I have been directly involved in the administration of justice. I have daily contact with the system, except weekends (and even then I can hardly walk out of the house when someone somewhere wishes to comment to me some aspect of law). Throughout all these years, I have had contact with lawyers, court administrators, judges, court reporters, court clerks, court interpreters, court staff and personnel, bailiffs, law enforcement agents, elected officials of all kinds. When I campaigned for office for over a year in 1996, I knocked on doors. I attended dozens of social functions and events – I still attend them regularly. I spoke to "the man in the street" during my campaign. Having been raised in Imperial County I am fortunate to have many friends and acquaintances. Many people comment to me about how they feel about what they perceive to be good or bad about our local courts. They also comment about what they perceive to be good or bad about attorneys and judges.

In all this time, under all of the aforementioned circumstances, never, not once, until I picked up the aforementioned newspaper, had I ever heard anyone say anything bad about Roger Benitez.

I feel privileged and honored to emphatically support Judge Roger Benitez' confirmation to the federal bench.

Dated: 2/23/04

RAYMOND AYALA COTA
Presiding Judge of the Superior Court
Imperial County, California

Written Testimony of Donal B. Donnelly
Judge of the Superior Court
State of California, County of Imperial
February 25, 2004
Hearing for Judge Roger Benitez before the Senate
Committee on the Judiciary

Judge Roger Benitez is highly qualified to serve on the United States District Court. I have known Judge Benitez for twenty years, and have worked with him in my capacity as a private lawyer, deputy district attorney and judge.

Judge Benitez has a superb intellect. His decision-making is carefully considered and scrupulously fair. He treats everyone before the court with dignity and respect. He harbors no judicial bias, other than adherence to the rule of law.

Based on decades of community service here in Imperial County, including volunteer work with local youth, Judge Benitez has a profound knowledge and understanding of this important border area.

We make up a sizeable part of the cases heard in the Southern District. Judge Benitez will be the first federal judge to hail from here. I urge his confirmation.

POLI FLORES, JR.
Attorney at Law
836 State Street
El Centro, CA 92243
CASBN 105732

TEX: 760/353-9700
FAX: 760/352-0764

December 10, 2003

The Honorable Orrin G. Hatch
U.S. Senate, Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Nomination of the Honorable **Roger Benitez**
U.S. District Court, Southern District of California

Dear Chairman Hatch:

I would like to take this opportunity to proudly endorse Roger Benitez to the prestigious Federal District Court, Southern District of California.

I have been an attorney for over twenty years in this community, a community where I was born and raised. I currently practice criminal law. Roger Benitez was a Superior Court judge in this county for several years before he was appointed to the Federal Magistrate's position he currently occupies. During his tenure as a Superior Court judge I appeared before him dozens of times. I have also appeared before him in his current capacity as a U.S. Magistrate. While I have not been a close personal friend of his, I have known him primarily at the professional level.

While he sat on the bench as a Superior Court judge, I also appeared before him during numerous informal pre-trial conferences with local prosecutors. I can unequivocally state that his superb demeanor, intelligence, pragmatism, and fairness is without too many judicial peers from my personal experience. He always treated those before him - lawyers, lay persons, probation officers, police officers - with the utmost respect. Never did he say or do anything that would arouse my concern regarding his demeanor. I do know him well enough to also say that his work ethic and administrative skills are outstanding. When he first took the bench, he had not practiced much criminal law. However, in a short period of time he became well versed in this area of law and its practical consequences in the real world. He did so through hard work. It is with deep conviction that I strongly urge this body to endorse Magistrate Benitez as a federal District judge.

Respectfully submitted,

Poli Flores, Jr.
Attorney at Law

cc:
The Hon. Patrick J. Leahy
The Hon. Dianne Feinstein
The Hon. Barbara Boxer

OREN R. FOX
Sheriff-Coroner-Marshal

(Retired)

205 Allen Street ~ Brawley, California, 92227 ~ United States of America
Phone (760)996-1099 (cell) ~ Fax (760)344-7757 ~ Home Phone (760)344-3997 ~ Email bigondo@onemain.com

September 10, 2003

Honorable Orrin Hatch
United States Senate
Chairman, Senate Judicial Committee
104 Hart Office Building
Washington, D.C., 20510

Re: Consideration of Honorable Roger Benitez for Federal District Court Judge

Dear Senator Hatch:

I am retired from law enforcement after 41 years of service with the State of California and the County of Imperial, here in California. The last 25 years of my career was spent as the elected Sheriff-Coroner- Marshal of Imperial County. During that time I was privileged to have had the opportunity to serve with numerous justice, municipal and superior court judges within the County and State, and magistrates and judges at the federal level in San Diego and Imperial Counties.

I have personally known Mr. Roger Benitez, currently a federal magistrate in El Centro, California, since he began his law career in Imperial County. Later, he was appointed to and elected to the combined Municipal and Superior Courts here in the County. Still later, he was appointed to a federal magistrates position here as well, a position he still holds.

Mr. Benitez has always been very involved with community affairs, volunteering his time to help in numerous endeavors. He has been a volunteer search and rescue worker for lost individuals in the desert areas of Southern California, spending countless hours over the past several years to locate and rescue lost persons. He has been active in numerous other events as well.

I have always considered him one of the finest jurist that I have ever known. He is a very caring and compassionate jurist in matters that call for such, and he certainly can be stern and authoritative when the situation arises. He guides attorneys through the judicial processes of the court, and renders sound legal opinions in matters pending before his court. He is fair and considerate of all those involved in the court process .His reputation is sound, and he has great integrity among law enforcement and the community at large.

It is a pleasure to wholeheartedly recommend Magistrate Roger Benitez to your committee for consideration of appointment to the position of Federal District Court Judge.

If I may be of further assistance in this matter, please do not hesitate to contact me. I remain,

Respectfully,

/S/

Oren R. Fox
Sheriff-Coroner-Marshall (Retired)
County of Imperial, State of California

News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

February 25, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
Hearing on the Nomination of

ROGER T. BENITEZ FOR THE
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

I am pleased to welcome to the Committee this morning Judge Roger Benitez, whom President Bush has nominated to fill a vacancy on the United States District Court for the Southern District of California.

Judge Benitez comes before us today as a highly regarded Federal Magistrate, with an impressive record of judicial service in both the state and federal judiciary. Born in Havana, Cuba, Judge Benitez's life embodies the spirit and strength of this nation. After coming to this country, he overcame numerous obstacles to put himself through college at San Diego State University. He obtained a law degree from the Western State University College of Law in 1978, and then distinguished himself in a diverse and successful law practice in Imperial County California. Appointed to the Imperial County Superior Court in 1997, and re-elected in 1998, he served with distinction until 2001. Since then, Judge Benitez has served as a federal magistrate judge in the Southern District of California.

I would note that a bipartisan committee selected Judge Benitez for his current position after a thorough review of his record and experience. Another bipartisan nominating commission found Judge Benitez to be highly qualified and recommended that he be appointed a district judge.

Despite these accomplishments and endorsements, a majority of the American Bar Association Standing Committee on the Federal Judiciary returned a rating of Not Qualified for Judge Benitez. In such instances, it has been the practice of this Committee to invite representatives of the ABA to explain the basis for the rating. Later in this hearing, we will hear from Tom Hayward, chair of the ABA Standing Committee, and Richard Macias, a former member of the Committee and circuit member who conducted the evaluation that led to Judge Benitez's rating. I welcome them on behalf of the Committee.

Finally, we will also hear from Judge Benitez's current supervisor – the Chief Judge of the Southern District of California, Judge Marilyn L. Huff. We welcome Judge Huff to the Committee, who will attest to Judge Benitez's fitness for the federal bench: his legal aptitude and experience, his integrity, and, most notably, his judicial temperament. It is my

understanding that concerns pertaining to temperament served as the basis for the ABA's rating. But I expect that Judge Huff's testimony today will satisfactorily address any lingering questions about Judge Benitez's temperament. I understand that Judge Huff is in the middle of a very important trial. It is a great testament to Judge Benitez that, despite her extremely busy schedule, she was eager to come to Washington on relatively short notice to testify on his behalf.

I would note that Judge Huff's testimony is endorsed by all eleven active judges of the Southern District of California. These are the people with whom Judge Benitez has worked closely for the past three years. They all support the nomination of Judge Benitez. They have put the weight of their admirable reputations behind Judge Benitez's nomination.

In addition to this testimony, the Committee has received written testimony and letters which strongly support Judge Benitez's nomination. Without objection I will submit them for the record. Since we will not hear from these witnesses in person, I would like to take a moment to share some of their views on Judge Benitez.

U.S. District Court Judge John Houston got to know Judge Benitez both professionally and personally when they worked together as magistrates in the Southern District. Judge Houston writes that he has, "observed his good character, integrity and temperament along with his dedication to public service to be invariant. In addition, Judge Benitez' experience as a lawyer and state court trial judge will make him an invaluable member of our bench and a source of pride for the citizens in this district for many years to come."

Presiding Judge of the Superior Court of Imperial County, Raymond Cota was extremely surprised to learn of the ABA's rating. He was born and raised in Imperial County and has worked closely with Judge Benitez. He wrote that he has, "never, in 25 years as an attorney and judge in Imperial County, heard any unflattering remarks or criticism of Roger Benitez of any sort."

Randy J. Rutten, President of the Imperial County Bar Association submitted this testimony: "I am the current President of the Imperial County Bar Association. On August 6, 2003 the Board of Directors of the Imperial County Bar Association unanimously and enthusiastically voted to endorse and support the nomination of Roger T. Benitez as an Article III judge for the Southern District of California. Our decision was based on Judge Benitez's reputation in the legal community as well as in the community in general."

Gary Wyatt, Chairman, Board of Supervisors, County of Imperial offered this testimony regarding Judge Benitez: "In 1997 he was appointed to the Superior Court by the then governor of the state of California. Before he was appointed he was vetted by the Judicial Nominations Evaluation Committee of the State of California. As part of that evaluation, confidential questionnaires were sent out to over 150 lawyers and judges asking for information concerning his legal ability, ethics, work ethics and temperament....During his tenure on the Superior Court, Judge Benitez proved himself to be a capable jurist who was valued and respected by the bar and his fellow judges. He had a reputation for being able to handle difficult legal tasks, exhibiting good judicial temperament and always being more than willing to assist his fellow judges, even if it meant asking other judges if he could help them with their calendars.... Because of his

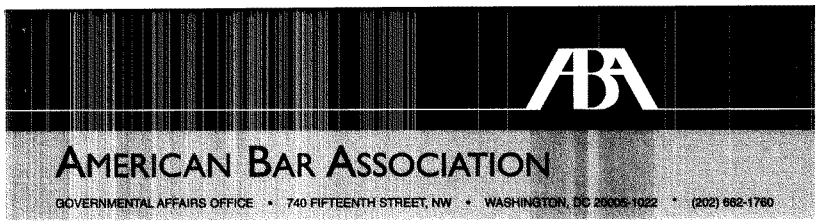
excellent reputation in the legal community and the community in general, our board of supervisors has unanimously adopted a resolution ... endorsing and recommending the confirmation of the Honorable Roger T. Benitez to the position of district judge of for the Southern District of California."

Eduardo A. Rivera, former Democratic Mayor of the City of Calexico and attorney wrote: "Judge Benitez is fair, rational, intelligent, and just. I have been treated with respect in all of my private practice dealings with Judge Benitez before he assumed the bench and have been treated fairly and equitably in his courtroom. Judge Benitez is compassionate and fair. It is therefore with dismay that I find some attorneys who have deemed his courtroom demeanor and temperament as improper. At no time in the last 25 years have I ever seen Judge Benitez exercise bad judgment or be discourteous with any person he has dealt with in either his capacity as a private attorney or as a State or Federal Judge."

Neil Gerber, an attorney in the municipality of El Centro stated, "As a state court judge, and then as a federal magistrate, Magistrate Benitez was always well prepared, engaging, and fair. His judicial temperament was excellent in all respects. He himself, displayed the highest respect for the courts, and inspired the same feeling in those who entered his courtrooms. Both as a state court judge and as a federal magistrate, Magistrate Benitez enjoyed the highest reputation for ability and integrity among the local bar."

These and other statements of support indicate clearly that Judge Benitez has the legal experience, ability, aptitude, character, integrity and temperament to serve as a federal District Judge. So I look forward to hearing and reviewing the testimony today as we consider this nomination.

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STATEMENTS

of

THOMAS Z. HAYWARD, JR.

and

RICHARD M. MACIAS

on behalf of the

STANDING COMMITTEE ON FEDERAL JUDICIARY

of the

AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF ROGER T. BENITEZ

TO BE JUDGE OF THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

before the

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FEBRUARY 25, 2004

STATEMENT OF THOMAS Z. HAYWARD, JR.

Mr. Chairman and Members of the Committee:

My name is Thomas Z. Hayward, Jr. I am a practicing lawyer in Chicago, and I am the Chair of the American Bar Association's Standing Committee on Federal Judiciary. With me today is Richard M. Macias, a former member of the Committee, and circuit member for this investigation. We appear here to present the views of the Association on the nomination of Roger T. Benitez to be a United States District Court Judge for the Southern District of California. After careful investigation and consideration of his professional qualifications, a substantial majority of our Committee is of the opinion that the nominee is "Not Qualified" for the appointment. A minority found him to be "Qualified."

I. Procedures Followed By The Standing Committee

Before discussing the specifics of this case, I would like to review briefly the Committee's procedures so that you will have a clear understanding of the process the Committee followed in this investigation. A more detailed description of the Committee's procedures is contained in the Committee's booklet entitled *Standing Committee on Federal Judiciary: What It Is and How It Works (April 2002).*

The ABA Standing Committee investigates and considers only the professional qualifications of a nominee -- his or her competence, integrity and judicial temperament. Ideology or political considerations are not taken into account. Our processes and procedures are carefully structured to produce a fair, thorough and objective peer evaluation of each nominee. A number of factors are investigated, including intellectual capacity, judgment, writing and analytical ability, industry, knowledge of the law, breadth of professional experience, character,

integrity, compassion, courtesy, open-mindedness, patience, freedom from bias, commitment to equal justice under the law, and general reputation in the legal community.

The investigation is ordinarily assigned to the Committee member residing in the judicial circuit in which the vacancy exists, although it may be conducted by another member or former member. In the current case, Mr. Macias, in his capacity as a former member for the Ninth Circuit, was asked to undertake this investigation because the current Committee member from the Ninth Circuit was already undertaking another investigation.

The investigator starts his investigation by reviewing the candidate's responses to the public portion of the Senate Judiciary Committee Questionnaire. These responses provide the opportunity for the nominee to set forth his or her qualifications, such as professional experience, significant cases handled and major writings. The circuit member makes extensive use of the questionnaire during the course of the investigation. In addition, the circuit member examines the legal writings of the nominee and personally conducts extensive confidential interviews with those likely to have information regarding the integrity, professional competence, and judicial temperament of the nominee, including, where pertinent, federal and state judges, practicing lawyers in both private and government service, legal services and public interest lawyers, representatives of professional legal organizations, and others who are in a position to evaluate the nominee's professional qualifications. This process provides a unique "peer review" aspect to our investigation.

Interviews are conducted under an assurance of confidentiality. If information adverse to the nominee is uncovered, the circuit member will advise the nominee of such information if he or she can do so without breaching the promise of confidentiality. During the personal interview with the nominee, the nominee is given a full opportunity to rebut the adverse information and

provide any additional information bearing on it. If the nominee does not have the opportunity to rebut certain adverse information because it cannot be disclosed without breaching the confidentiality, the investigator will not use that information in writing the formal report and the committee, therefore, will not consider those facts in its evaluation.

Sometimes a clear pattern emerges during the interviews, and the investigation can be briskly concluded. In other cases, conflicting evaluations over some aspect of the nominee's professional qualifications may arise. In those instances, the circuit member takes whatever additional steps are necessary to reach a fair and accurate assessment of the nominee.

Upon completion of the investigation, the circuit member submits an informal report on the nominee to the Chair, who reviews it for thoroughness. Once the Chair determines that the investigation is thorough and complete, the circuit member then prepares the formal investigative report, containing a description of the candidate's background, summaries of all interviews conducted (including the interview with the nominee) and an evaluation of the candidate's professional qualifications. This formal report, together with the public portions of the nominee's completed Senate Judiciary Committee questionnaire and copies of any other relevant materials, is circulated to the entire 15-member committee. After carefully considering the formal report and its attachments, each member submits his or her vote to the Chair, rating the nominee "Well Qualified," "Qualified," or "Not Qualified."

I would like to emphasize that an important concern of the Committee in carrying out its function is confidentiality. The Committee seeks information on a confidential basis and assures its sources that their identities and the information they provide will not be revealed outside of the Committee, unless they consent to disclosure or the information is so well known in the community that it has been repeated to the Committee members by multiple sources. It is the

Committee's experience that only by assuring and maintaining such confidentiality can sources be persuaded to provide full and candid information. However, we are also alert to the potential for abuse of confidentiality. The substance of adverse information is shared with the nominee, who is given full opportunity to explain the matter and to provide any additional information bearing on it. If the information cannot be shared with the nominee, the information is not included in the formal report and is not considered by the Committee in reaching its evaluation.

II. The Investigation of the Nominee

Magistrate Judge Benitez was nominated on May 1, 2003. Carol Dinkins of Houston, Texas, who was then chair of the Standing Committee, assigned Mr. Macias to the investigation, as explained above. He began his investigation shortly after receiving the nominee's May 21, 2003, responses to the public portion of the Senate Judiciary Committee Questionnaire. The investigation took longer to complete than most investigations because negative information about the nominee's professional qualifications was uncovered.

On July 22, 2003, Mr. Macias submitted to Chair Dinkins an informal report of the results of his investigation, including summaries of all of his confidential interviews and a description of his interview with the nominee. Because the report contained information adverse to the nominee, Chair Dinkins asked Mr. Macias to conduct additional interviews with both lawyers and judges to assure that the concerns expressed in the report were reflective of the views of a very broad spectrum of individuals who had knowledge of the professional qualifications of the nominee. On October 10, 2003, Mr. Macias' formal report was transmitted to all of the members of the Committee. Those who had questions were encouraged to contact Mr. Macias directly. After all of the Committee members had an opportunity to study the report and all the attachments, each member reported his/her vote regarding the rating of the nominee to

the chair. A substantial majority of the Committee found the nominee "Not Qualified" and a minority found him "Qualified." This vote was reported to you on October 21, 2003.

Mr. Macias will now describe his investigation of the nominee.

STATEMENT OF RICHARD M. MACIAS

Mr. Chairman and Members of the Committee:

My name is Richard M. Macias. I am an attorney from California and, as Mr. Hayward indicated, I am a former member of the Committee. I served a full term on the Committee starting in 1994, and have provided frequent assistance on an "as-needed" basis since then. I have personally conducted approximately 60 investigations for the Committee and have reviewed many more reports prepared by other Committee members.

In 2003, I was asked to undertake the investigation of the qualifications of Roger T. Benitez to serve as a United States District Judge. My investigation was conducted in the same manner all investigations by the Standing Committee are conducted, as Thomas Hayward just explained.

My investigation took place during the summer of 2003. In addition to carefully reviewing pertinent materials, such as the nominee's responses to the questionnaire, his legal writings and other documents that he sent me to review, my investigation of the professional qualifications of Judge Benitez included approximately 67 confidential interviews with members of his legal community, including 23 judges and 44 lawyers. During each conversation, I asked how the person knew the nominee and what the person knew about the nominee's professional competence, judicial temperament, and integrity that would bear on his competence to be a United States District Judge. I interviewed almost all -- if not all -- of the District Court Judges and Magistrate Judges of the Southern District of California and the Imperial County Superior

Court Judges. I also made a particular effort to locate and speak with attorneys who had made court appearances before the nominee.

I also met privately with the nominee in his office in El Centro on two separate occasions. During our meetings, each of the many concerns over Judge Benitez' qualifications that had been raised during my investigation was discussed, and the nominee was given a full opportunity to respond to and rebut the adverse information and to provide any other additional data, information, or materials that he wished me to consider. Because I received more negative comments concerning this nominee than I had ever received about any other person I have investigated, I met with Judge Benitez twice and spent considerably longer conferring with him than what is normally required.

A substantial number of the judges and lawyers I interviewed raised significant concerns about Judge Benitez' judicial temperament and his courtroom demeanor. Many of the interviewees were initially reluctant to discuss the nominee until I assured them that everything they told me would be held in the strictest confidence. Over the past ten years, I have conducted many investigations for the Southern District of California and, fortunately, I have established a reputation as someone who keeps his word and can be trusted to keep matters confidential when asked to do so.

The lawyers with whom I spoke were civil and criminal practitioners, both prosecutors and defense lawyers, from San Diego and Imperial County, where Judge Benitez practiced law from 1979 to 1997, sat as an Imperial County Superior Court Judge from 1997 to 2001, and has served as a federal Magistrate Judge for the Southern District of California from 2001 to the present.

Over and over I received negative comments regarding Judge Benitez' judicial temperament. Interviewees repeatedly told me that Judge Benitez displays inappropriate judicial temperament with lawyers, litigants, and judicial colleagues; that all too frequently, while on the bench, Judge Benitez is arrogant, pompous, condescending, impatient, short-tempered, rude, insulting, bullying, unnecessarily mean, and altogether lacking in people skills.

Interestingly, a significant number of judges and lawyers with whom I spoke specifically reported that Judge Benitez would often become irrationally upset and outraged if an attorney, who had been appointed to represent a defendant, had a scheduling conflict and asked another equally competent and prepared attorney to appear before the nominee on behalf of the defendant. Scheduling conflicts are a fact of life for litigators: they are a common, everyday occurrence. The people who specifically mentioned this behavior as one example of the nominee's injudicious temperament assured me that almost no other Magistrate Judge in California or Arizona would be the least bit perturbed under similar circumstances.

A number of people with whom I spoke expressed grave doubts over Judge Benitez' ability to competently handle the more demanding docket caseload of a federal district judge and efficiently manage a district courtroom, based on their perception of his very slow and rigid manner of handling his current court calendar in El Centro.

Based on their exposure to the nominee's mode of relating professionally to others in his official capacity as a judge, interviewees expressed doubt over Judger Benitez' ability to become an accommodating and collegial member of the federal district court.

Many of the interviewees further expressed the sentiment that the nominee's temperament problems are compounded by the fact that Judge Benitez fails to appreciate the depth of concern

by the bench and bar regarding his temperament and has not demonstrated that he is willing or able to address these concerns.

I discussed each of the negative comments I received with Judge Benitez when I interviewed him in person. His response was to consistently deny the accuracy of what I had been told. He was unable to explain why so many people would make incorrect, negative comments about him. Frankly, in light of the substantial number of negative comments brought to Judge Benitez' attention, we would have hoped he might have responded that he had not fully appreciated how he was perceived by others and that he would strive to markedly improve his temperament and demeanor. No such conciliatory comments were forthcoming from the nominee.

Our committee members, after reviewing my report on the nominee, were particularly concerned about the clear, consistent pattern to the criticisms that emerged from the interviews. A substantial number of Judge Benitez' professional peers that I interviewed complained about his lack of interpersonal skills and were deeply concerned that he lacked the judicial temperament essential for a district court judge. My colleagues on the committee were not dissuaded over the seriousness of these allegations by the fact that I reported that I interviewed some lawyers who told me that they had not encountered any problems when they had appeared before Judge Benitez.

After careful consideration of my report, a substantial majority of the Committee was of the view that Judge Benitez is "Not Qualified" for a life tenured appointment to the District Court. A minority of the Committee found him to be "Qualified."

Our Committee takes most seriously its responsibility to conduct an independent peer evaluation of the professional qualifications of judicial nominees. There is no simple formula

that we can apply to determine if a nominee is "Well Qualified," "Qualified," or "Not Qualified." Our recommendation is not the result of tallying the positive and negative comments we receive about a particular nominee or giving an assigned weight to other factors that bear upon professional competence. Rather, in making our evaluation, we draw upon our own professional experience, the cumulative experience of the Standing Committee as a whole, the information and knowledge we gain about the nominee during the course of the investigation, and our independent judgment. We do our utmost to impartially apply the same standards and criteria to every nominee, and we take our job very seriously, especially when, like today, we have negative information to report about the professional qualifications of a nominee for a lifetime appointment to the federal bench.

Thank you for the opportunity to appear before you today. Tom Hayward and I stand ready to respond to any questions you might have.

WRITTEN TESTIMONY OF HON. JOHN A. HOUSTON
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF CALIFORNIA

FEBRUARY 25, 2004

Hearing For Judge Roger T. Benitez before the Senate Committee On The Judiciary

To Chairman Hatch and Senators on the Committee On The Judiciary:

This testimony is in support of the President's nomination of the Honorable Roger T. Benitez for the position of United States District Judge in the Southern District of California.

I am a United States District Judge in the Southern District of California. Immediately prior to being sworn as a district judge in October 2003, I served as United States Magistrate Judge in the Southern District of California for five and one/half years. I have known Judge Benitez since his appointment as a United States Magistrate Judge in this district and I have come to know him both professionally and personally.

During the period since Judge Benitez has been a colleague, I have been fortunate to spend time with him in a varied range of settings, from being in isolated, recreational environments hundreds of miles from Southern District courtrooms to the routine settings providing for the give and take between colleagues in the courthouse environment. In the more causal, recreational and /or private settings, I have observed Judge Benitez to be a very personable gentleman having the ability to maintain personal wellness and balance by having many interests outside of the area of law. He conducts himself when not in public view in a manner indicative of one possessing strong moral fiber. In these circumstances, Judge Benitez has always been consistent in his display of commendable personal, family and moral values and in the exercise of exceptional moral judgment. In the professional setting, we have had the traditional judge to judge consultations on court-related matters. On these occasions, he presents himself as a quick study and approaches problem solving in a logical and confident manner, based upon a solid foundation of legal experience and restraint. In both settings, I have observed his good character, integrity and temperament along with his dedication to public service to be invariant.

In addition to the aforementioned attributes, Judge Benitez' experience as a lawyer and state court trial judge will make him an invaluable member of our bench and a source of pride for the citizens in this district for many years to come. I look forward to your favorable consideration of the nomination of Judge Benitez and to calling him a colleague on the district court.

Respectfully submitted,

JOHN A. HOUSTON
United States District Judge
Southern District of California

Written testimony of Chief Judge Marilyn L. Huff, Southern District of California
February 25, 2004
Hearing on the Nomination of Roger T. Benitez
Before the Senate Judiciary Committee

Chairman Hatch, Senator Leahy, Senator Feinstein and Distinguished Members of the Senate Judiciary Committee,

Thank you for the invitation to testify at the hearing on the nomination of Roger T. Benitez to be a United States District Judge for the Southern District of California. I am Marilyn L. Huff, the Chief Judge of the Southern District of California. I favor the confirmation of Roger Benitez as a district judge as he possesses the skills and judicial temperament to help our court with its heavy caseload.

Our court continues to be one of the busiest district courts in the nation for criminal felony cases, trials, and supervised release hearings. In recognition of the court's workload, Congress authorized five judgeships for the Southern District effective July 15, 2003. Additionally, the United States Judicial Conference recently recommended five more positions (2P, 3T) because of the court's heavy caseload. Our court thanks the bipartisan efforts of this Committee for responding to our critical need for these judicial resources, and to President Bush, Senator Feinstein, and Senator Boxer for the creation of a bipartisan merit selection committee. This committee, after undertaking significant investigation, unanimously recommended Magistrate Judge Roger T. Benitez for one of these positions. As the Chief Judge of the court where Magistrate Judge Benitez serves, I am confident that he will make a positive contribution to the administration of justice as a district judge.

Magistrate Judge Roger Benitez has served the district at a divisional court in Imperial County since January 1, 2001. He is the first full time magistrate judge in Imperial County, a desert community approximately two hours away from San Diego. In that capacity, he assisted the court in responding to the increased caseload along the Southwest border. The Southern District of California includes San Diego and Imperial Counties with a combined population of over three million residents. Additionally, the Southern District includes six ports of entry along the Southwest border with over 90 million border crossings per year. Imperial County alone had over 23 million border crossings in 2003, resulting in a large number of federal prosecutions for drug or immigration violations.

As law enforcement increasingly focused its attention on the Southwest border, the caseload in the Southern District rose dramatically. Significantly, the criminal caseload in Imperial County became approximately one third of the criminal caseload of the court. After the retirement of a part time magistrate judge who served the court for many years, the district court unsuccessfully tried to hire another part time magistrate judge, but ultimately concluded that the criminal caseload justified a full time magistrate judge in Imperial County. The United States Judicial Conference agreed, and authorized a full time magistrate judge in Imperial County. GSA also authorized a new magistrate courthouse there on an accelerated schedule.

The district court appointed a merit screening panel consisting of lawyers and community members to recommend five potential candidates for the newly created position of full time magistrate judge. Superior Court Judge Roger Benitez came to the district court's attention after the merit selection panel recommended him as one of the finalists. The district judges conducted their own due diligence, and discovered that Judge Benitez was held in high regard in the judicial and legal community. He was known for his good judicial temperament. He had a reputation as an even-handed judge. He received numerous accolades from his former colleagues on the bench and lawyers that appeared in front of him. He was an experienced Imperial County practitioner, a highly respected Superior Court judge, and the embodiment of the American dream. During the investigation, the court discovered that he had a compelling personal story.

Roger Benitez was born in Havana, Cuba. His parents lost everything when Fidel Castro came to power, but they cared for their children. His parents sent him to Miami at the age of ten along with his brother. He quickly assimilated to the United States. Ultimately, his mother was able to flee Cuba and reunite with her children. She eventually took a job as a teacher in El Centro, California. As a result, Roger Benitez moved with his family to Imperial County in 1964, pursued his secondary, undergraduate and legal education in Southern California, and settled in Imperial County. He rose from his modest immigrant beginnings in the United States to become a well respected Superior Court judge.

We also learned that Judge Benitez possessed the attributes to be an excellent magistrate judge. He was diligent, resourceful, efficient, knowledgeable, compassionate, fair and considerate. Based on his excellent reputation, our interview, and the favorable results of the FBI and IRS background investigations, the federal district judges appointed him as a United States Magistrate Judge for the Southern District of California.

Since his appointment, Magistrate Judge Benitez has demonstrated his ability to administer justice fairly and to adjust to changing times at the request of the district court. Previously, the part time magistrate judge only presided over initial arraignments in Imperial County. Within three days, the prisoners were transferred to San Diego for a repeat of all arraignments before another magistrate judge. This was a duplication of effort. At the same time, the cost of housing prisoners in San Diego contract facilities was more than twice as expensive as in Imperial County. When the number of criminal cases escalated in Imperial County, the court changed to a full time magistrate judge. The prisoners remained in Imperial County while Magistrate Judge Benitez completed all preliminary hearings, saving the court and the U.S. Marshal significant time and resources. Our former Acting U.S. Marshal estimates that the process of housing prisoners in Imperial County rather than in the more expensive San Diego contract facilities saved approximately $5.2 million over the three year period since Magistrate Judge Benitez joined the federal bench. Over this time, his 4,524 initial appearances in Imperial County saved the court the repetition of these appearances in San Diego.

Magistrate Judge Benitez also improved the quality of justice for indigent defendants in Imperial County. Due to staffing limitations with a part time magistrate judge, the court previously did not appoint counsel for the case until the defendants were in San Diego. Additionally, the court did not have certified interpreters in Imperial County because it was not a full time court. When the

full time magistrate judge was authorized, the court received funding for staff for the office, and asked Magistrate Judge Benitez to transition the court from a part time practice to a full service magistrate court.

The transition to a full service court was not an easy task, but Magistrate Judge Benitez was able to successfully resolve numerous logistical issues for the benefit of the litigants with the policy direction set by the district court. Others did not always agree with the district court policy decisions about the newly created divisional office. Nevertheless, Magistrate Judge Benitez effectively implemented our policies, took the heat from our policy decisions at times, and made the court function. For example, the district judges decided to send to Imperial County a proportional amount of civil cases that are frequently resolved on the papers, such as social security, prisoner 1983 and habeas cases. The reports and recommendations that I have reviewed from Magistrate Judge Benitez on these civil cases have been excellent. Many of my district court colleagues have also commented upon the superior quality of his written work. His work on these cases also reduced the burden on his fellow magistrate judges.

We decided not to force all other civil litigants to travel to Imperial County for their cases if the case had no connection to Imperial County, but reserved the right to send some cases there. This was because Magistrate Judge Benitez had criminal duty every day of the week, while the magistrate judges in San Diego only had criminal duty once every nine weeks. As a result of the district court's policy decisions, Magistrate Judge Benitez has handled more criminal cases than civil cases compared to his colleagues. Like any divisional court, the caseload mix in one court is not identical to the caseload mix in the other court. Moreover, the district court changed some of our policies as the new court evolved.

Unquestionably, Magistrate Judge Benitez has been a diligent judge for the court. In 2003, for example, he handled 1,494 initial appearances for criminal cases. This compares to the Northern District of California, a similarly sized court with ten magistrate judges, where their entire magistrate bench only handled 1341 initial appearances in 2003. Given the volume of the criminal cases that came before Magistrate Judge Benitez, the district judges are highly pleased with the work that he has performed.

Beyond his work ethic, he has demonstrated an ability to set up a functioning and successful divisional court. A major task was to provide indigent defense for defendants in Imperial County when the federal criminal defense bar was almost exclusively from San Diego, two hours away. We formed a committee of district judges and Magistrate Judge Benitez to recommend an implementation plan for the transition to a full service court. The court adopted the committee's recommendation to establish a full time Federal Defender's office in Imperial County and to permit the criminal justice act panel attorneys to volunteer for service in Imperial County. In order to conserve defense costs, we also implemented their recommendation that the defense attorneys have duty for a week at a time in order to provide them with notice of their voluntary week and enough cases to make the trips worth their while.

Of course, there were times with over 4,500 appearances that the lawyers schedules conflicted with the court's schedule, but the overall result was that we were able to provide better representation for the criminal defendants. The district judges were familiar with the superior performance of Magistrate Judge Benitez because the judges routinely reviewed the transcripts of his Rule 11 pleas until the law changed and never voiced criticism of his judicial temperament. Additionally, there were few, if any requests for bail review even though all magistrate judge bail determinations are subject to an expedited de novo review if appealed to the district court. The procedures established by the court and Magistrate Judge Benitez helped the prosecution and the defense, as the vast majority of cases were resolved without a trial. Our federal bench is proud of the fact that the federal court management statistics for 2003 show that the Southern District of California is the second fastest in the nation for resolution of criminal cases. With a significant number of the criminal cases originating in Imperial County, Magistrate Judge Benitez assisted the court by implementing an effective system for criminal case management.

Magistrate Judge Benitez is also organized and resourceful. Our court also asked Magistrate Judge Benitez to work with GSA to oversee a build to suit tenant lease project for the construction of a courthouse. The project provides an accelerated design and construction period while also delivering a cost-effective building project. I am pleased to report that the building schedule remains on track to meet the July 2004 occupancy date, a remarkable example of organization and oversight on the part of Magistrate Judge Benitez.

In sum, Magistrate Judge Benitez has been an asset to the federal bench. He possesses the intellect, experience and temperament to be an excellent district court judge. Based on our positive experiences with Magistrate Judge Benitez, the district judges were not surprised that he was unanimously chosen by the bipartisan merit selection committee to be recommended as a United States District Judge. We were surprised and disappointed to learn that the ABA has a different view of his qualifications. While I respect the ABA and its judicial evaluations process, I am more persuaded in this case by the unanimous recommendation of the bipartisan merit selection committee that led to his nomination by the President and the collective views of my fellow active district court judges who, like me, support Magistrate Judge Benitez for district judge.

We the active judges of the Southern District of California join in the comments of Chief Judge Marilyn L. Huff in support of the nomination of Roger T. Benitez.

DATED: 2-23-04

JUDITH N. KEEP, Judge
United States District Court

M. JAMES LORENZ, Judge
United States District Court

IRMA E. GONZALEZ, Judge
United States District Court

LARRY A. BURNS, Judge
United States District

BARRY TED MOSKOWITZ, Judge
United States District Court

DANA M. SABRAW, Judge
United States District

THOMAS J. WHELAN, Judge
United States District Court

JOHN A. HOUSTON, Judge
United States District Court

NAPOLEON A. JONES, JR., Judge
United States District Court

WILLIAM Q. HAYES, Judge
United States District Court

JEFFREY T. MILLER, Judge
United States District Court

WRITTEN TESTIMONY OF JEFFREY B. JONES,
JUDGE OF THE SUPERIOR COURT OF THE STATE OF CALIFORNINA, COUNTY OF IMPERIAL

February 25, 2004

Hearing for Judge Roger T. Benitez before the Senate Committee on the Judiciary

Mr. Chairman, Senator Hatch, and members of the Committee:

I thank you for the opportunity to testify regarding the nomination of Judge Roger T. Benitez to the United States District Court for the Southern District of California.

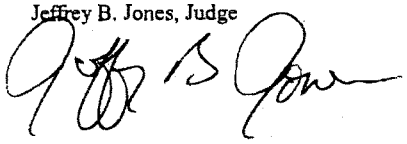
I have known Judge Benitez since 1986, when I began practicing law in Imperial County. Over the years we had occasion to work on several cases together, always as adversaries. I am pleased to say that Judge Benitez was a worthy opponent; he was always prepared, and clearly devoted much time and effort to his cases. And, Judge Benitez was an ethical and collegial adversary. It was a pleasure to work with him in depositions, and he never failed to keep his word. It is notable that he was sensitive to vulnerable witnesses and parties, even if opposed to them.

I was appointed to the bench in 1997, as was Judge Benitez. I had the opportunity to work with him on a daily basis. The collegiality he showed as an attorney carried through to the bench. Judge Benitez was available to discuss judicial and administrative matters, and I, for one, was grateful for his comradeship. On three or four occasions I had the opportunity to sit in on his calendar, and found that he handled the matters before him with cordial efficiency. I am personally unaware of any instance where Judge Benitez lost his composure, even under trying circumstances. And, he exhibited one of the most important, but little-discussed, qualities of a judge: he did not decline to hear an assigned case unless legally disqualified.

In my opinion, Judge Benitez is eminently qualified to serve as a United States District Court Judge.

I will be happy to answer any of the Committee's questions if further testimony is needed. Thank you.

Jeffrey B. Jones, Judge



U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Opening Statement Of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Judicial Nominations Hearing
February 25, 2004

In making his second recess appointment of a judicial nominee, a nomination that was debated at length before the Senate to which the Senate withheld its consent, President Bush has engaged in an inappropriate use of the constitutional authority to make recess appointments when the Senate is unavailable to consider them. This Administration and its partisan enablers in the Senate have again demonstrated their disdain for the constitutional system of checks and balances and for shared power among the three branches of our Federal Government. By such actions, this Administration shows that it seeks all power consolidated in the Executive and that it wants a Judiciary that will serve its narrow ideological purposes.

Such overreaching by this Administration is hurting the courts and the country. President Bush and his partisans have disrespected the Senate, its constitutional role of advice and consent on lifetime appointments to the federal courts, the federal courts, and the representative democracy that is so important to the American people. It is indicative of the confrontational and "by any means necessary" attitude that underlies so many actions by this Administration and that created the atmosphere on this Committee in which Republican staff felt justified in spying upon their counterparts and stealing computer files.

After eight years in office in which more than 60 judicial nominees had been stalled from consideration by Republican partisans, President Clinton made his one and only recess appointment of a judge. He did so to bring diversity to the Fourth Circuit, the last federal circuit court not to have had an African-American member. Judge Roger Gregory was subsequently approved by the Senate for a lifetime appointment under Democratic Senate leadership in the summer of 2001. This was made possible by the steadfast support of Senator John Warner, the senior Senator from Virginia, and I have commended my friend for his actions in this regard. Judge Gregory was one of scores of highly qualified judicial nominations stalled under Republican Senate leadership. Sadly, others, such as the nominations of Bonnie Campbell, Christine Arguello, Allen Snyder, Kent Markus, Kathleen McCree Lewis, Jorge Rangel, Carlos Moreno and so many others have not been reinstated and considered.

By contrast, the current President has made two circuit appointments in two months and his White House threatens that more are on the way. These appointments are from

among the most controversial and contentious nominations this Administration has sent the Senate. After reviewing their records and debating at length, the Senate withheld its consent. The reasons for opposing these nominations were discussed in open debate during which the case was made that these nominees were among the handful that a significant number of Senators determined had not demonstrated that they would be fair and impartial. By contrast, Republicans prevented Judge Gregory's nomination from being considered by the Judiciary Committee or the Senate.

Republicans shut down the confirmation process when they took issue with Executive Branch appointments by President Clinton. In contrast, Democratic Senators have proceeded to confirm two of this President's judicial nominees after he made the Pickering recess appointment and have offered to debate and vote on two others on which there have been anonymous Republican holds for months.

Today, the Judiciary Committee is holding its fifth judicial nomination hearing of 2004. We are one hearing away from the total number of such hearings held throughout 1996 and more than halfway to the total of those held in 2000. By this date in 1996 or 2000, the preceding two presidential election years, only one hearing had been held by this Committee to consider judicial nominees. At the end of this hearing, we will have held hearings on 12 judicial nominees this year. The total considered by this date in the last presidential election year was two. And, we have moved forward with hearings in spite of the pending investigation into the spying and stealing by Republican staff of the computer files of Democratic Senators from the Judiciary computer server.

The American people understand that Democrats on this Committee have shown great restraint and extensive cooperation in the confirmation of 171 of this President's judicial nominations and by continuing to move forward this year despite the partisanship shown by Republicans.

Today's hearing is to consider the nomination of Roger Benitez to the Southern District of California. Judge Benitez is being considered for the last of five new seats in the Southern District of California that were created by statute on November 2, 2002, as part of a package of judgeships created for border districts that have a massive caseload and that needed more federal judges. I worked hard with Senator Feinstein to help create these new positions under Democratic Senate leadership. By doing so, we did what the Republican majority refused to do in the years 1995 through 2000 when there was a Democratic President. We did so under Senate Democratic leadership with a Republican President.

Unlike many other nominees who have come before this Committee, Roger Benitez comes before us with judicial qualifications, having had experience serving as a judge both in State and federal courts. He served for four years as a California Superior Court Judge for Imperial County and three years as a U.S. Magistrate Judge for the Southern District for California.

Like some other nominees who have come before this Committee, however, Roger Benitez comes before us with concerns having been raised about his fitness to serve. Judge Benitez is the 26th judicial nominee of this President to be considered who received a partial or majority rating of "Not Qualified" from the ABA Committee that conducts a peer evaluation of judicial nominees. Of those, 16 have already been confirmed and another has been recess appointed.

Before President Bush ejected the ABA from the process of providing an informal rating prior to a nomination, temperament or ethics concerns would have been raised at the early stage of a nomination's consideration and in time for the White House to make a decision whether to proceed with that nominee, with knowledge of such determinations and the opportunity to conduct follow-up inquiry. The change in the role of the ABA has led to ABA ratings being less helpful.

The Senate Judiciary Committee's practice has been to invite the ABA to testify in connection with a nomination when a circuit or district court nominee has earned a majority or unanimous rating of "Not Qualified." This is the third time since this Administration took office that the ABA is here to testify about a nominee's majority "not qualified" rating.

The ABA reviews nominees in three areas: competence, integrity and judicial temperament. In Judge Benitez's case, based on interviews with 23 judges and 44 attorneys, more than 10 members of the ABA committee concluded that, based on his temperament, he is not qualified to serve a lifetime appointment on the federal bench. Members of this Committee and of the Senate now have the opportunity to form their own impressions and make their own determinations. We welcome the input from the ABA based on their investigation.

I am pleased to welcome the current Chair of the ABA's Standing Committee on the Federal Judiciary, Tom Hayward. Mr. Hayward is a partner at Bell, Boyd & Lloyd in Chicago and is a corporate and real estate lawyer. He is the past president of the Chicago Bar Association, where he was General Chair of the Committee on the Evaluation of Judicial Candidates and a founding member of the Young Lawyers Section. He has served as a member of the ABA House of Delegates since 1984 and has served on the ABA Board of Governors since 1998. I look forward to his testimony.

I also welcome here today Mr. Robert Macias, a former member of the American Bar Association's Standing Committee on Federal Judiciary who conducted the investigation into this nominee.

I would also like to recognize Chief Judge Marilyn Huff of the Southern District of California who has come today to speak in favor of Judge Benitez's confirmation.

Finally, I welcome Judge Benitez and look forward to hearing his testimony before us today.

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LAW OFFICES
KEESAL, YOUNG & LOGAN
A PROFESSIONAL CORPORATION

400 OCEANGATE
P.O. BOX 1730
LONG BEACH, CA 90801-1730
(562) 436-2000
FACSIMILE:
(562) 436-7416
www.kyl.com

SAMUEL A. KEESAL, JR.
STEPHEN YOUNG
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MELANIE L. HOWEN
RYAN C. VICARI
BENJAMIN W. WHITE
JARED S. MacDONALD
KATHLEEN S. ADAMS

OF COUNSEL
MICHAEL H. WOODELL*†
RICHARD A. APPELBAUM‡
REAR ADMIRAL, U.S.C.G. (RET.)
ELIZABETH A. KENDRICK
RICHARD L. LANDES
ERIC T. SANDERS*

* ADMITTED IN ALASKA
† ADMITTED IN WASHINGTON
‡ ADMITTED IN WASHINGTON & CALIFORNIA
§ ADMITTED IN ALASKA & CALIFORNIA
± ADMITTED IN DISTRICT OF COLUMBIA & FLORIDA
* REGISTERED FOREIGN LAWYER WITH THE LAW SOCIETY OF HONG KONG & ADMITTED IN NEW YORK
ALL OTHERS ADMITTED IN CALIFORNIA

November 11, 2003

Via Facsimile - 202-228-1698
and U.S. Mail

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: The Honorable Roger T. Benitez

Dear Chairman Hatch:

I have known the Honorable Roger T. Benitez as an attorney, co-counsel and a judge. At all times, he has acquitted himself as a gentleman with a truly appropriate, polite yet firm temperament. He is a gentleman's gentleman and a judge's judge. I recommend him without hesitation.

Please do not hesitate to contact me if I can be of further assistance.

Best regards,

SKIP

Samuel A. Keesal, Jr.

SAK:kdg (sak/political/apprec/hatch)

cc: The Honorable Patrick J. Leahy
The Honorable Dianne Feinstein
The Honorable Barbara Boxer

SAN FRANCISCO OFFICE
SUITE 1500
FOUR EMBARCADERO CENTER
SAN FRANCISCO, CA 94111
(415) 398-6000
FACSIMILE:
(415) 981-0136 • (415) 951-7729

ANCHORAGE OFFICE
SUITE 660
1029 WEST THIRD AVENUE
ANCHORAGE, AK 99501-1964
(907) 279-9696
FACSIMILE: (907) 279-4239

SEATTLE OFFICE
SUITE 1615
1301 FIFTH AVENUE
SEATTLE, WA 98101
(206) 622-3790
FACSIMILE: (206) 343-9529

HONG KONG OFFICE
1603 THE CENTRE MARK
287 QUEEN'S ROAD CENTRAL
HONG KONG
(852) 2854-1718
FACSIMILE: (852) 2541-6139

939 W. MAIN STREET, SUITE 202
EL CENTRO, CALIFORNIA 92243 - 2844

PUBLIC DEFENDERS OFFICE

TELEPHONE:
(760) 482-4510

FAX NO.
(760) 352-2587

September 25, 2003

The Honorable Orin Hatch, Ranking Member
Committee of the Judiciary
United State Senate
104 Hart Senate Office Building
Washington. D.C. 20510-4402

Re: Nomination by President George W. Bush
of Roger T. Benitez to the position of District Judge
in the United State District Court for the Southern
District of California

Dear Senator Hatch,

I am writing this letter expressing my support for the nomination of Roger T. Benitez by President Bush, to the United State District Court for the Southern District of California.

I am a attorney who has been licenced to practice law in the State of California for over thirty three years (33). I have been the Chief Public Defender for the County of Imperial, State of California for over twenty years (20). Prior to holding this position, I was a Deputy District Attorney for Imperial County.

It therefore gives me great pleasure to submit this letter of recommendation for Roger T. Benitez, who I have known for over twenty (20) years.

I have known Judge Benitez though the various phases of this legal career, from his days in private law practice, to Superior court Judge of Imperial County and to his present position of Federal Magistrate.

During his years in private law practice in Imperial County, he had a reputation with the legal community as a vary competent civil litigator, who was always prepared whether appearing before a Judge or handling a civil case before a jury.

During his time as a Superior Court judge for Imperial County, my office appeared before him on numerous criminal matters. Judge Benitez was hard on defendants when it was needed, but was also willing to show compassion when it was warranted. He was always well prepared and away on "top" of his caseload, and expected the same from the

attorneys appearing in his court. Judge Benitez has good judicial temperament and is courteous to his employees and the attorneys who appeared before him. He is a judge who is definitely in control of his court.

Since becoming a Federal Magistrate, my office has not appeared in his courtroom but according to a United State Attorney who appears regularly before him, he continues to do an excellent job.

Besides serving the community as a Judge he has also showed is "public sprint" by serving for a number of years on the Planing Commission for the City of El Centro, California.

I feel that Judge Benitez is highly qualified to serve as a District Court Judge, and therefore support his nomination to the District Court for the Southern District of California. I urge your committee to give his nomination a favorable recommendation.

Very truly yours,

GREGG L. McDONOUGH
Chief Public Defender
County of Imperial
State of California

Written Testimony of the Honorable Louisa S Porter
Magistrate Judge, Southern District, California
February 25, 2004
Hearing for Judge Roger Benitez before the Senate Committee on the Judiciary

I, Louisa S Porter, am a magistrate judge and President of the Federal Magistrate Judges Association. I served as the Presiding Magistrate Judge for the United States District Court - Southern District - California from 1997 to 2002. As such I had the opportunity and responsibility to administer at a time of significant growth of the numbers, duties and complexity of the bench.

During this time the court transformed its former satellite Imperial County facility to a full service court. This was necessitated by the increasing number of criminal cases originating from the east county border area which included, not only, immigration offenses, but also, significant drug related offenses.
The Magistrate Judge selected to operate this new concept for the Southern District - California was Roger T. Benitez. As Presiding Judge I worked closely with Judge Benitez during this time of transition and I am in a position to comment upon his talents, character and abilities to serve this nation and the court as an Article III District Judge.

The federal court located in Imperial County was a sleepy little court which had been housed in a number of interesting locations, including the local VW dealership (now a Kawasaki showroom), the basement of the post office and, more recently, in a strip mall. It was manned by a part-time magistrate judge and provided a minimum of services. For the Imperial County location, the part-time magistrate judge handled only the most initial of criminal matters but without a civil caseload.

Judge Roger Benitez was the ideal selection for the magistrate judge to transition this court to full service. He was an experienced Imperial County practitioner who had passed the scrutiny of the state of California selection process to become a superior court judge. He came to us with accolades from all of his fellow and presiding judges.

Judge Benitez demonstrated that he is a self starter who quickly evaluated the difficulties of the task at hand and methodically handled them with skill and efficiency. With the transition of the court these efforts included:

1. Negotiating responsibilities and duties of the Imperial County jail and it's relationship to the court and the United States Marshal's Service.
2. Establishing a dedicated cadre of attorneys to represent indigent criminal defendants.
3. Administering a satellite court staff and coordinating with the San Diego court center, Pretrial Services, Probation and Marshal's Service agencies (all of which also established branch offices in Imperial County).
4. Coordinating with the Federal Public Defender and United States Attorney offices that also had to respond to the need by establishing more full service offices in Imperial County.
5. Dealing with numerous agencies to establish workable protocols.
6. Overseeing and supervising the construction of an Imperial County U.S. District Courthouse located in El Centro, California.

While undertaking all of these activities, Judge Benitez was also assisting the San Diego court with establishing new, more efficient and judicially sound procedures for presentation of weekend criminal matters. He accomplished this while also handling 40% of the new criminal matters (60% of the drug related matters) for the entire district as well as a civil, habeas, prisoner 1983 and social security appeal caseload.

During this time of transition, I met with representatives of the U.S. Attorney Office, Federal Defender Office and the criminal defense bar once a week in order to address any problems that may have developed. From the people most directly effected by the changes, I heard praise for Judge Benitez' talent and handling of transition issues.

Judge Benitez has served the Southern District of California court and the public well as a magistrate judge and will prove an exemplary Article III District Judge.

I have nothing but the highest respect for Judge Roger Benitez. Judge Benitez came to this country as an immigrant from Cuba at a time when Castro was devastating free thinking in that country. He has worked hard to be a good and productive citizen of these United States. He became an attorney and, later, a judge as a result of character and a desire to better himself and his family through education. He represents the American dream and is a wonderful example to others of the benefits of United States citizenship.

I assure you that this President and this Senate will be proud of the appointment of Judge Roger T. Benitez to an Article III position with the United States Courts.

WRITTEN TESTIMONY OF EDUARDO A. RIVERA IN SUPPORT OF THE NOMINATION OF JUDGE ROGER BENITEZ TO THE U.S. DISTRICT COURT OF CALIFORNIA

February 25, 2004

HEARING FOR JUDGE ROGER BENITEZ BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

Please accept my written testimony on behalf of the nomination of Judge Roger Benitez to the U.S. District Court of California for the Southern District. It is with great please and enthusiasm that I offer my support on behalf of Judge Roger Benitez for his appointment to the Federal Judgeship of the U.S. District Court for the Southern District of California.

It is with great distress that I learned that Judge Benitez was found "not qualified" by the American Bar Association and that the ABA will lobby members of the committee of the judiciary against Judge Benitez's nomination.

I am a private attorney in private practice in Calexico, California for the last thirty (30) years. I am Democrat and a supporter of both Senator Feinstein and Senator Boxer. I am also a supporter of US Representative Bob Filner. These Federal legislator represent my congressional district and state. I am a former elected City of Calexico official and former Mayor for the City of Calexico and elected member of the local school board. I have worked for the United Farmworkers Union both in San Diego and in La Paz (Keene), California.

I have known Judge Benitez since he started practicing law, became a Superior Court Judge for Imperial County and was named United States Magistrate for the U.S. District Court for the Southern District of California, in El Centro, California. I have practiced with and against Judge Benitez and have appeared before his court in both the State and Federal venues.

Judge Benitez is fair, rational, intelligent and just. I have been treated with respect in all of my private practice dealings with Judge Benitez before he assumed the bench and have been treated fairly and equitably in his courtroom. Judge Benitez is compassionate and fair. It is therefore with great dismay that I find some attorneys who have deemed his courtroom demeanor and temperament as improper. At no time in the last 25 year have I ever seen Judge Benitez exercise bad judgment or be discourteous with any person he has dealt with in either in his capacity as a private attorney or as a State or Federal Judge.

Judge Benitez was always well prepared in his private practice. He was very successful in representing his vast array of clients and their interests. When litigating

matters against Judge Benitez when we were both in private practice, he was nothing short of honorable and effective. As a Judge, his decisions were well reasoned, fair and just. His understanding of the law is paramount and he was one of the wisest jurist in the Imperial County Superior Court system during his tenure in that position. I have appeared before Judge Benitez in the Federal Magistrate Court on numerous occasions and he has welcomed me with sincerity and respect. I have had the great pleasure of appearing before numerous magistrate judges in the Southern District Court and Judge Benitez compares extremely favorably in my experience with other Magistrates currently sitting in the Southern District Court.

Judge Benitez is efficient and handles the magistrate calendar in El Centro, California efficiently, on time and with the utmost respect for the parties. The Magistrate's Court in El Centro, California deals approximately 95% with undocumented aliens and drug importation cases. The majority of the defendants are of Mexican or Central American origin. Judge Benitez treats these Latino defendants with respect and sincerity. At no time have I witnessed Judge Benitez berate either these Latino defendants or their attorneys. When judicial discretion is required of Judge Benitez, I have observed a man who decides matters with compassion, integrity and respect for the rule of law.

As a member of the Imperial County Local Bar, I have had occasion to discuss the travesty and decision of the ABA in its rating of Judge Benitez. The Local Bar by a vast majority supports Judge Benitez in his nomination for the Federal Judgeship. I am aware that some members of the Local Bar may not agree with my opinion but these members are few.

Simply put, Judge Benitez will make an excellent Federal Judge. His past conduct as a private lawyer, a Superior Court Judge and Federal Magistrate clearly demonstrate that he is well qualified to discharge the duties of a Federal Judge. It is clear that he will rule fairly, treat litigants and attorneys with respect and follow the rule of law.

Imperial County is a small county of 150,000 people. Judge Benitez is one of this county's finest citizens. Notwithstanding, that Judge Benitez may not be a Democrat, I consider him an outstanding candidate for a Federal Judgeship. Not only is he is truly qualified but I am very honored to consider him a friend.

If you should need any further information, feel free to contact me.

Atentamente,

Eduardo Rivera

EDUARDO A. RIVERA
Attorney at Law

EAR/ha

IMPERIAL COUNTY BAR ASSOCIATION

Post Office Box 43, El Centro, California 92244
Telephone (760) 352-2321
Facsimile (760) 353-9553

Randy J. Rutten, President
William Smerdon, Vice-President
Heather M. Cutlip, Secretary/Treasurer
Lance E. Korten
Kris M. Becker
Jeffrey M. Garber
Steven M. Walker

September 11, 2003

Senator Orrin Hatch
104 Hart Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I'm writing this letter in regard to the nomination of Magistrate Judge Roger T. Benitez to the United States District Court for the Southern District of California. I have been a practicing attorney in Imperial County and a member of the Imperial County Bar Association for more than twenty years. During that period of time I came to know Judge Benitez in his capacity as a private attorney, as a judge for the Superior Court of California and as a federal magistrate. During his time in private practice he was a member in good standing of the Imperial County Bar Association and served on the Board of Directors and as President. Our current Board of Directors unanimously endorse and support Judge Benitez' nomination. We are confident that Judge Benitez will serve the best interests of justice for all persons that come before him.

Respectfully submitted,

Randy J. Rutten

Randy J. Rutten, President
Imperial County Bar Association

WRITTEN TESTIMONY OF RANDY J. RUTTEN
President, Imperial County Bar Association
February 25, 2004
Hearing for Judge Roger T. Benitez before the Senate Committee for the Judiciary

I am the current President of the Imperial County Bar Association. On August 6, 2003 the Board of Directors of the Imperial County Bar Association unanimously and enthusiastically voted to endorse and support the nomination of Roger T. Benitez as an Article III judge for the Southern District of California. Our decision was based on Judge Benitez's reputation in the legal community as well as in the community in general.

My personal experiences with Judge Benitez are in accord with the Board's decision. I am an attorney licensed in California and have practiced in Imperial County since 1982. I was admitted to practice in the United States District Court-Southern District in 1993. Judge Benitez and I have known each other since I came to the Imperial County. My experiences with Judge Benitez include being adversaries on more than one occasion while he was still practicing law. He always exhibited the highest legal abilities and ethical standards.

In 1997 Judge Benitez was appointed to the Imperial County Superior Court and served as a judge there until 2001. I appeared before him in several matters over that time frame. My clients and I were treated fairly and with respect. In 2001 Judge Benitez was appointed to be a United States Magistrate for the United States District Court, Southern District of California with his courtroom here in El Centro. I have appeared before him on several more occasions and my clients and I have always been treated fairly and with a welcoming attitude.

Prior to becoming a judge, Judge Benitez served several years on the Board of Directors of the Imperial County Bar Association and also served as its President. He also served as a member and Chairman of the El Centro Planning Commission. He was a member of the Private Industry Council Board of Directors and on the El Centro Community Hospital Bioethics Committee. In addition to other volunteer services that he provided to the community, Judge Benitez served as a coach for two of our local high schools participating in the Constitutional Rights Foundation High School Mock Trial program including being a co- coach of the Central Union High School team that won the 1996 State Championship.

I have personally seen Judge Benitez handle very busy calendars as both a Superior Court judge and as a United States Magistrate in a firm, fair and efficient manner. If called as a witness I could competently testify to the matters stated herein.

Sincerely,
Randy J. Rutten
628 Main Street
El Centro, CA. 92243
(760) 352-2321

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Dated this 23rd day of February, 2004 at El Centro, California.

Randy J. Rutten

Mayor and Council Members
Ray Castillo
Jack Dunnam
Larry Grogan
Jack Terrazas
Cheryl Walker

September 11, 2003

The Honorable Orrin G. Hatch
United States Senate
104 Hart Office Building
Washington, DC 20510

Re: Nomination of United States Magistrate Roger T. Benitez for Federal District Court Judge for the Southern District of California

Dear Senator Hatch:

At its meeting of September 17, 2003, the El Centro City Council unanimously supported the proposed appointment of our United States Magistrate, the Honorable Roger T. Benitez, to the position of Federal District Court Judge for the Southern District of California. The City Council further directed that I write to you as Chairman of the Senate Judiciary Committee to communicate the City Council's complete support of Magistrate Benitez's nomination with the request that your Committee take action to recommend that the United States Senate formally consent to his appointment.

Judge Benitez was born in Havana, Cuba. He came to the United States and to Imperial County, California in 1964. Judge Benitez has been a vibrant, contributing member of our community ever since. He is a product of our local school system. He received his Associate of Arts Degree from Imperial Valley College, El Centro in 1971 and his Bachelor of Arts from San Diego State University in 1974. He completed his education at Western State University (now Thomas Jefferson Law School), receiving his Juris Doctorate in 1978. He was admitted to the California State Bar in 1979.

Judge Benitez has dedicated his life to the betterment of our Imperial Valley. After graduation from law school and admission to the California State Bar, he "came back home" to establish his law practice and to become very active in the community. He is a past or present member of many civic and professional organizations such as Kiwanis Club Foundation, El Centro Toastmasters, De Anza Search & Rescue, El Centro Planning Commission, Imperial County Bar Association, Imperial County

El Centro City Hall
1275 Main Street, El Centro, CA 92243 (760) 337-4540 Fax (760) 352-6177

Law Library Foundation, and American Trial Lawyers Association, to name a few. He is dedicated to supporting our youth having co-coached to State championships our local Central Union High School Mock Trial Team (1986) and our under age 19 open soccer team (1994).

After several years affiliation with very reputable local law firms Judge Benitez was appointed to the Superior Court of Imperial County, California in 1997, elected in 1998. He was appointed U.S. Magistrate Judge, U.S. District Court for Southern District of California in 2001.

It is with great pleasure that the El Centro City Council unanimously supports the nomination of the Honorable Roger T. Benitez for District Judge for the Southern District of California.

We respectfully request the Senate Judiciary Committee to recommend to the United States Senate that Judge Benitez's nomination be approved.

Sincerely,

Jack Terrazas
Mayor, City Of El Centro

cc: United States Senator Diane Feinstein
United States Senator Barbara Boxer
El Centro City Council

Steven M. Walker
Attorney at Law
1225 Main Street, Suite B
Tel: (760) 352-4001 **El Centro, CA 92243** **Fax: (760) 352-5561**

December 12, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United State Senate
224 Dirken Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I write this letter as an irritated observer of the Judicial Appointment process.

It is my understanding that the nomination of Roger Benitez, (currently a Federal Magistrate) of the United States District Court for Southern District of California is being held up by nit witted politicos. The rumor mills suggests that the stall has something to do with Judge Benitez' apparent lack of a judicial temperament. Balderdash.

As a trial attorney, I have known, opposed, collaborated with, and appeared in front of Roger Bentiez. He is a man with the highest ethical standards, and not given to make decisions based upon personal expediency - where in his own personal life, when he was a practicing attorney, and certainly not from the bench. This state and country would be well served to have Roger Benitez serving as a judge of United States District Court.

Please use the good graces of your offices to get the judiciary committee "off the dime". Roger Benitez deserves better. More importantly, the good people of Southern California deserve better, and deserve a man like Roger Benitez serving on the Federal bench.

Sincerely yours,

Steven M. Walker

SMW:bab

cc: Kristi L. Remington
The Honorable Patrick J. Leahy
The Honorable Diane Feinstein
The Honorable Barbara Boxer

Written testimony of Gary Wyatt
Chairman, Board of Supervisors, County of Imperial

February 25, 2004

Hearing for Judge Roger T. Benitez before the Senate Committee on the Judiciary

Dear Mr. Chairman and Members of the Committee:

Thank you for this opportunity to submit this written testimony supporting the nomination of Judge Roger T. Benitez to the United States District Court Judge for the Southern District of California.

Judge Benitez has been a member of the Imperial Valley community since 1964. He attended local schools and after graduating from law school he returned to the Imperial Valley because this is where he and his wife wanted to raise their family.

Prior to becoming a judge, he was an associate and then a partner in a local law firm that had an excellent reputation. Judge Benitez was a part of that firm for over 18 years.

His practice was a general practice which exposed him to a broad range of legal matters and called for his appearing in many courts throughout the state and the country. As a lawyer he enjoyed an excellent reputation among lawyers and judges.

In 1997 he was appointed to the Superior Court by the then governor of the state of California. Before he was appointed he was vetted by the Judicial Nominations Evaluation Committee of the State of California. As part of that evaluation, confidential questionnaires were sent out to over 150 lawyers and judges asking for information concerning his legal ability, ethics, work ethics and temperament.

Shortly after his appointment, he was selected by his fellow judges on the Imperial County Superior Court to be the Presiding Judge of the Appellate Division of that court.

As required by California Law, Judge Benitez was then required to stand for election. He was elected by the voters of this county to an additional six year term in 1998. Imperial County has had many contested judicial elections, particularly where the judge was recently appointed by the governor. In fact, the last two judges appointed by a governor to an Imperial County position not only faced a

contested election, but were defeated. Judge Benitez broke that trend.

During his tenure on the Superior Court, Judge Benitez proved himself to be a capable jurist who was valued and respected by the bar and his fellow judges. He had a reputation for being able to handle difficult legal tasks, exhibiting good judicial temperament and always being more than willing to assist his fellow judges, even if it meant asking other judges if he could help them with their calendars.

After almost three and one half years as a Superior Court Judge, Judge Benitez became the first full time United State Magistrate Judge in Imperial County. Before being chosen for that position, he was screened by a merit selection committee consisting of members of the public, as well as judges and lawyers from Imperial and San Diego counties. He was also investigated by the FBI in order to discover whether or not he had any biases, ethics or temperament issues that might disqualify him from filling the position. The district judges in the Southern District then completed their due diligence and selected Judge Benitez to fill that position. He was sworn in on January 2, 2001.

Since his appointment to Magistrate Judge, Judge Benitez has presided over one of the busiest courts within one of the busiest districts in the country. His work load has included a large criminal calendar as well civil matters and habeas corpus cases.

When the new district judge positions were created for the Southern District of California, Judge Benitez applied for one of those positions. Judge Benitez' application, as well as that of others, were reviewed and considered by a bipartisan Judicial Nominations Committee established with the cooperation of President Bush and Senators Feinstein and Boxer. That committee is made up of members of the public, lawyers and a retired judge, all of whom are highly capable and respected. After conducting many interviews and doing their due diligence, the committee recommended Judge Benitez as being qualified for the appointment. Judge Benitez was then again investigated by the FBI. He was subsequently nominated by the President on May 1, 2003.

Written testimony of
Gary Wyatt, Chairman
Board Of Supervisors, County of Imperial
February 25, 2004

Judge Benitez is well respected in our community. As a judge he is known for being fair, a hard worker, and making tough calls, even when a call might be unpopular. His reputation is such that our local newspaper recently published an editorial supporting his confirmation.

As a member of our fine community, Judge Benitez has volunteered in many youth and civic organizations. He was appointed to act as a planning commissioner by our largest city. He served as the chairperson of that commission and was reappointed. He was appointed by the Imperial County Board of Supervisors to serve on the board of directors of the Imperial County Private Industry Council, the body charged with oversight of programs maintained under the Job Training Partnership Act. He also served as a volunteer member of a community hospital's Ethics Committee.

In addition, Judge Benitez was active in youth programs intended to promote recreation and education of our young people, many of whom are minorities or come from disadvantaged homes. Judge Benitez was active in the High School Mock Trial program, youth soccer and youth swimming.

Judge Benitez was also active for many years in the De Anza Rescue Unit which consists of volunteers who donate their time and money in order to conduct search and rescue operations for persons lost or injured in the hostile environment of our deserts, as well as Baja California, Mexico.

Because of his excellent reputation in the legal community and the community in general, our board of supervisors has unanimously adopted a resolution, a copy of which is attached, endorsing and recommending the confirmation of the Honorable Roger T. Benitez to the position of district judge for the Southern District of California.

RESOLUTION BY THE IMPERIAL COUNTY BOARD OF SUPERVISORS IN SUPPORT OF JUDICIAL NOMINATION OF ROGER T. BENITEZ TO THE UNITED STATES DISTRICT COURT

Resolution No. 2003-084

WHEREAS, on May 1, 2003, Federal Judge Magistrate Roger T. Benitez received a judicial nomination to the United States District Court, Southern District of California; and

WHEREAS, prior to his appointment to the position of Federal Judge Magistrate, Roger T. Benitez served as a Superior Court Judge in and for the County of Imperial, State of California from 1997 to 2001; and

WHEREAS, prior to his appointment to the Superior Court, Roger T. Benitez practiced law in the County of Imperial for more than 18 years gaining the respect and admiration of the legal community; and

WHEREAS, Federal Judge Magistrate Roger T. Benitez has demonstrated that he possesses the intellect, experience, and temperament to be a federal judge and would be an excellent addition to the United States District Court, Southern District of California; and

WHEREAS, the Imperial County Board of Supervisors is desirous of expressing its support of the judicial nomination of Roger T. Benitez for United States District Court, Southern District of California to the Senate Judiciary Committee; and

NOW THEREFORE BE IT RESOLVED, that the Imperial County Board of Supervisors fully supports the judicial nomination of Roger T. Benitez to the United States District Court, Southern District of California, and

BE IT FURTHER RESOLVED, that the Imperial County Board of Supervisors respectfully requests the Senate Judiciary Committee confirm the judicial nomination of Roger T. Benitez to the United States District Court, Southern District of California.

PASSED AND ADOPTED, by the Board of Supervisors, County of Imperial, State of California, this 30TH day of September 2003, by the affirmative roll call vote.

JOE MARUCA, Chairman
Board of Supervisors
County of Imperial

ALBERT ESPINOSA, Clerk
Board of Supervisors, County
of Imperial, State of California

Christopher W. Yeager
Judge

Superior Court of California
County of Imperial

939 Main Street
El Centro, CA 92243
Tel: (760) 482-4257
Fax: (760) 337-7742

November 3, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Federal Court Nominee Roger Benitez

Dear Mr. Chairman:

I am writing you in support of Roger Benitez because I believe very strongly that Roger would be a positive addition to the federal bench.

I have known Roger since the early 1980's when I was a prosecutor in the D.A.'s office and he was in private practice. He had an outstanding reputation, as did his law firm. I opposed him on a contested matter and found him to be very professional, ethical, and well-prepared. We later co-coached our local high school's Mock Trial team to several county championships, and, in 1986, to the State Championship. Roger was a pleasure to work with and was largely responsible for bringing the students up to that high level.

Following his appointment to the Superior Court in 1997, Roger continued his excellent relationship with his former election opponent and earned the respect of every other judge on the bench. He was a quick learner, and soon took on a full criminal law assignment, though his background was largely civil practice. It is a measure of his proficiency in criminal matters that he was never routinely disqualified by either the public defender or district attorney's office. (as I was presiding judge during this time period, I was made aware of such disqualifications)

AN EQUAL OPPORTUNITY / AFFIRMATIVE ACTION EMPLOYER

Roger was the consummate team player while on our bench. He took on any assignment, and if he finished early, would come to our administrator seeking more work. He had an immediate positive impact on our court; we always knew an assignment was well-covered in Roger's court.

We come from a small town, where reputations extend beyond one's professional status. Roger is held in the highest regard, not only as a judge, but as a community leader, family man, neighbor and friend. He will, for years to come, continue to reflect well upon the administration that elevates him to the federal bench.



Christopher W. Yeager

NOMINATIONS OF PETER W. HALL, OF VERMONT, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT; JANE J. BOYLE, OF TEXAS, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS; MARCIA G. COOKE, OF FLORIDA, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA; AND WALTER D. KELLEY, JR., OF VIRGINIA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

WEDNESDAY, MARCH 10, 2004

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 2:33 p.m., in room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senators Cornyn and Leahy.

OPENING STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. This hearing of the Senate Judiciary Committee will come to order. I appreciate Senator Hatch, the Chairman of the Committee, for allowing me to chair this hearing as the list of four distinguished nominees includes one from Texas as well as those from Vermont, Virginia, and Florida. It is an honor to welcome each of you here today as well as your families and friends and guests to the Committee.

I note that all four nominees—one for the Federal appeals court bench and three for the district court bench, are distinguished lawyers, each having received a "well qualified" rating from the American Bar Association. Peter Hall is the nominee to be U.S. circuit judge for the Second Circuit. In addition, we have three nominees to the Federal district courts: Jane Boyle, the nominee for the Northern District of my home State of Texas; Marcia Gail Cooke is the nominee for the Southern District of Florida; Walter Kelley, Jr., is nominee for the Eastern District of Virginia. I commend President Bush for nominating each of you, and I look forward to your testimony.

Now, we have a number of Senators who want to naturally introduce their nominees from their State, and out of deference to them, I will proceed to your introductions, and then follow accordingly as Senators arrive, and I know they have got to balance a variety of different responsibilities so we will try to accommodate each of the introducers as much as we possibly can.

But first let me turn, of course, to the distinguished ranking member, Senator Leahy, for his opening statement.

Senator LEAHY. Mr. Chairman, I am going to be here for a while, and I see the distinguished senior Senator from Virginia, my Senator when I am away from home, and the distinguished Senator from Vermont, my Senator when I am home, and I would be happy to withhold as a courtesy to the two of them, if they would like to go first.

Senator CORNYN. Very well.

We would be delighted to hear from you, Senator Warner, any comments you would care to make.

PRESENTATION OF WALTER D. KELLEY, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA, BY HON. JOHN WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Thank you, Mr. Chairman. And I thank my good friend Senator Leahy, who is recognized in this institution as setting the decorum and standards which all of us aspire to.

Colleagues and other distinguished guests here in this important hearing of the U.S. Senate, I am privileged to introduce Walt Kelley and his family. I am going to ask Walt, since my voice is a little raspy and I have got to preserve it for a tumultuous speech I am going to give on the floor shortly, would you introduce your family?

Mr. KELLEY. Certainly. I am delighted to have with me today my three children, Collier Kelley, Catherine Kelley, and Thurman Kelley.

Senator WARNER. Stand up there, young man.

[Laughter.]

Mr. KELLEY. And also my wife, Jennifer Kelley, and my mother, Frances Kelley, and a couple of dear friends who are adopted family, Roy and Bev Graeber. They all came up from Norfolk today.

Senator CORNYN. Excellent. Welcome to each of you. Thank you for being here.

Senator WARNER. I thank the Chair and the members for welcoming this family. As we all know, these are arduous tasks that are taken on by jurists, and the family support is essential to the discharge of their responsibilities.

Now, this fine individual fills the vacancy of Judge Henry Morgan, and sort of like you, Senator Leahy, you and I have been here long enough, we are down on the third rung of judges that we are reporting. When we first came, those that we first put in are gone, and the second are retiring, and here you and I are on the third round in filling this particular post.

Senator LEAHY. We are like the old war horses.

Senator WARNER. Yes, we are the old war horses.

Judge Morgan informed Senator Allen and me about his intent to take senior status, so we began our usual very thorough search, and it is interesting. I approach these things very pragmatically because I was privileged at one time to be in the profession of law. And this fine individual came to the forefront in each of our meetings, when we talked about various persons that we consult with in connection with judicial appointments. And it was clear to the good Senator Allen and myself that this man was eminently qualified.

He graduated from Washington and Lee where I was privileged to graduate from, and then after working for years as press secretary to a Member of the United States House of Representatives, he returned to Washington and Lee and earned his law degree magna cum laude. Subsequent to law school, Mr. Kelley served as law clerk to a judge on the United States Court of Appeals for the Second Circuit in New York City, and we are fortunate that after his 1-year clerkship was completed, he returned to his home town in Norfolk to practice law.

Since then, for 22 years, he has practiced law for two of Virginia's best law firms, Wilcox and Savage, and Troutman Sanders. And during these two decades-plus of his legal career, his practice has focused primarily on complex business litigation before the Federal courts.

I am going to ask unanimous consent to place the balance of my remarks into the record, Mr. Chairman.

Senator CORNYN. Without objection.

Senator WARNER. I have to join the members of the Intelligence Committee. We have got an emergency meeting at this point in time. So I am going to ask that the Chair allow my distinguished colleague and dear friend, Senator Allen, to complete my remarks on my behalf.

I thank you for the courtesies.

[The prepared statement of Senator Warner appears as a submissions for the record.]

Senator CORNYN. Thank you, Senator Warner.

Senator Allen, we would be pleased to hear any remarks you would like to make by way of introduction.

PRESENTATION OF WALTER D. KELLEY, JR., OF VIRGINIA, NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA, BY HON. GEORGE ALLEN, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator ALLEN. I will. Thank you, Mr. Chairman and Senator Leahy, and I thank my colleague Senator Warner. I will put the rest of his statement in the record.

Senator CORNYN. Without objection.

Senator ALLEN. I was crossing through some of my remarks, so I will try not to repeat.

I am very happy to be here and pleased and honored to support Walter DeKalb Kelley, Jr.—we know him as "Walt"—to serve as judge in the Eastern District of Virginia, U.S. District Court.

I have known Walt for a long period of time now, and I am always impressed by him. I will get into some of his background. But I have found him to always be even-tempered. No matter the situa-

tion, no matter how fractious things might be, he always had a good, steady demeanor, which I think is an important aspect for being a trial judge. Where things can get a bit hectic, does someone keep their cool? Are they evenhanded? Are they fair-minded?

Senator Warner and I interviewed many outstanding nominees for this judgeship in the Eastern District of Virginia. The things I care about are experience, to the extent you can determine someone's experience as a judge, and also their judicial philosophy. On the latter point of judicial philosophy, Walt Kelley as a judge is one who understands the proper role of the judiciary, to adjudicate disputes based on the evidence before them and not make the law. This is something I know, Mr. Chairman, that you care a great deal about, as I do, and my colleague Senator Warner. It is important. And I feel very safe in saying that as a judge, Walt Kelley would understand the proper role of the judiciary.

As far as experience, while not a judge having judicial experience, he has a tremendous amount of experience in the courtroom, arguing and taking to final adjudication 25 cases in various Federal courts. That is an impressive number. He has been supported and endorsed by the Virginia Association of Defense Attorneys, the Virginia State Bar. The American Bar Association has given Walt Kelley a unanimous opinion of "well qualified." He is rated "AV" by Martindale-Hubbell. The Virginia Bar Association supports his nomination as well as the Virginia Women Attorneys Association.

It is no wonder he has been listed since 1997 as one of the best lawyers in America for business litigation, and it may not sound all that great all the time, but in Virginia Business Magazine, they call him the "legal elite," and he is amongst the legal elite, according to Virginia Business Magazine for civil litigation.

Senator Warner went through all his education, and other matters that I think are important are what he does in the community. He is the Chairman or Rector of the Board of Visitors at Old Dominion University in Norfolk. He is a trustee at Norfolk Collegiate School, where he attended and where his three children currently attend school. He is an adjunct professor in antitrust law at the law school at Regent University. He served on the Virginia Attorney General's Task Force on Higher Education. He also is the director of the Hampton Roads Salvation Army Adult Rehab Center Advisory Board, making sure that folks are rehabilitated from being addicted to drugs or using drugs, and to become more productive citizens.

Senator Warner has introduced his wife and twin sons and daughter and his mother, Frances. I know there are friends—Bev Graeber is back there, and he has a lot of support—that have come all the way up from Norfolk here.

I will just sum it up, Mr. Chairman and Senator Leahy. Walt Kelley is an outstanding individual. He has the experience, he has the temperament, and I think he will be an outstanding judge for many decades to come in the Norfolk division in the Eastern District of Virginia. He has the qualifications, he has the temperament, and he is a quality individual whom we will all be proud to support and watch as a judge.

I thank you for your time and your care, and I hope you will promptly move this nomination forward so he can get to work in handling the caseload there as soon as possible.

Senator CORNYN. Thank you, Senator Allen, for those glowing remarks, and we appreciate your time here very much.

At this time we would be delighted to recognize Senator Jeffords for any introductory remarks he may care to make.

Senator LEAHY. Incidentally, I might mention, Mr. Kelley may want to save a transcript of what you and Senator Warner said. Those are glowing tributes from two Senators I respect greatly, and I have a feeling if his career is like anybody else's career in the judiciary or anything else, there may be occasions when some, probably as he sentences them to prison or something, may have less flattering things to say. So this will give him something to look at.

[Laughter.]

Senator ALLEN. Thank you, Senator Leahy. Appreciate it.

PRESENTATION OF PETER W. HALL, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT, BY HON. JIM JEFFORDS, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator JEFFORDS. Well, thank you. I am very pleased to be here. I know Senator Leahy agrees with me wholeheartedly in what I will say, and I will agree wholeheartedly with whatever he says. I just want to let you know that we believe that Peter W. Hall for a seat on the United States Second Circuit Court of Appeals is a most qualified individual and are delighted to recommend him.

But I am also a bit melancholy because the nomination is for the seat that was held by my very close friend, the late Fred Parker. The loss of Judge Parker created a tremendous void in the legal community of Vermont and the Second Circuit. Judge Parker left some big shoes to fill, both literally and figuratively. But Peter is the ideal candidate to accomplish this task.

Peter and I both live in the Rutland area of Vermont. This has permitted me to know him and closely follow his career for over 20 years. The insight and knowledge allowed me to confidently nominate Peter in 2001 to serve as the U.S. Attorney for Vermont, and now enthusiastically support his nomination for a position on the Second Circuit Court of Appeals.

I have the utmost faith in his ability to continue the line of excellent judges from Vermont in the Second Circuit Court of Appeals. The nomination comes from a Committee with strong support of a large bipartisan group of Vermonters. Jim Douglas, the Governor of Vermont, offered Peter's name to the President as the nominee for this seat, and both Senator Leahy and I supported this nomination. In addition, my constituents believe Peter will be an outstanding judge on the Second Circuit Court of Appeals, and I know from so many members of the bar letting me know how they feel that he will certainly be welcomed by the Vermont Bar Association and their members.

Peter will come to the Second Circuit with an extensive and wide knowledge of the law. Following law school, he clerked for Hon. Albert W. Coffrin, a U.S. District Court Judge for Vermont. Peter has also worked for a prestigious law firm in Rutland and held a variety of positions in the United States Attorney's Office, most re-

cently as a U.S. Attorney for Vermont, a position for which the Senate unanimously confirmed him in 2001.

In all these positions, Peter has excelled and done extraordinary work. I have heard nothing except praise from his colleagues and firmly believe he will continue this record of excellence on the Second Circuit.

Peter has also exhibited a proper temperament to be an exceptional jurist. I believe this comes naturally to Peter through his upbringing in Vermont, and I know that Peter will serve in the Vermont tradition of prudence and fairness.

I appreciate this opportunity to introduce Peter Hall to you for a seat in the Second Circuit Court of Appeals. I believe you will see in him what I have seen in many years, an individual who has strong values and exceptional judgment. I hope the Senate will swiftly confirm him to the seat, thus extending the line of excellent Vermont judges on the Second Circuit.

Thank you.

Senator CORNYN. Thank you, Senator Jeffords.

Senator Leahy?

PRESENTATION OF PETER W. HALL, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT, BY HON. PATRICK LEAHY A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Well, thank you, Mr. Chairman, and like Senator Jeffords, I am very pleased to introduce and recommend Peter Hall to the Committee. We have been saying such nice things about him. I wonder, Peter, if you might just stand up so we can see who it is we are talking about. In a few minutes, you will get a chance to introduce everybody else who is with you, and I might mention that I see with Mr. Hall one of his predecessors as U.S. Attorney, Charlie Tetzlaff, who was also a superb U.S. Attorney, and both long-time friends.

In this position, the President, as has been said, has nominated Mr. Hall for a seat on the Second Circuit. By tradition, Vermont has had one of the seats on the Second Circuit. And in mentioning that, I should say, as Senator Jeffords has, there is a reason this seat is vacant. There was a superb Second Circuit judge, Fred Parker, who was there. Fred was a close friend of mine, of Senator Jeffords, of Mr. Hall, Mr. Tetzlaff, and so many others. He died tragically of a heart attack this past summer. And Judge Parker had been appointed to the U.S. District Court for Vermont back in 1990 by the first President Bush and the strong recommendation of Senator Jeffords and with my support. He was a well-known Republican and the deputy attorney general, and later he was appointed to the Second Circuit by President Clinton, again on my recommendation and Senator Jeffords' recommendation. It was maintaining the sense that we have tried to stay out of partisan politics in our judges. Fred was a good man, a good lawyer, and a good judge. I was a schoolmate of his at Georgetown. I knew him from that time on as a man of integrity and intelligence, and he is missed.

Now, I mention all these things because it is fitting that we have Peter Hall, our current U.S. Attorney, again carrying on this tradition of bipartisanly supported, nonpartisan judges. He was ap-

pointed U.S. Attorney by President Bush. He has the strong support of Governor Jim Douglas, a Republican Governor of Vermont, of Senator Jeffords, Independent Senator from Vermont, and of this Democratic Senator from Vermont. And I think he is up to the job.

Now, he did have certain problems, I should point out, to be honest, Mr. Chairman. He had the nerve to be born in Connecticut. If only someone had spoken to him in time. He went all the way to North Carolina for college. He attended law school in New York. But he did finally come to his senses as he graduated from law school. He came back and worked as a clerk for Judge Albert Coffrin, actually a man who had been appointed by President Nixon to the court, and both Mr. Tetzlaff and I had worked in the law firm that Mr. Coffrin had been in before.

After he completed that clerkship, he joined the United States Attorney's Office in Vermont. He was a Federal prosecutor for the next 18 years, becoming first assistant, later named U.S. Attorney.

During those years, he gained invaluable trial experience, which is so beneficial for any judge. He also learned about the Federal criminal law. So Mr. Hall's experience is not just Government service. In 1986, he began a 15-year career in the private practice of law, in civil practice, with a particular emphasis on mediation. But he also used that time to serve the State Bar Association. He provided ethics training to Vermont State prosecutors. He held the Office of the President of the Vermont Bar Association where he advocated funding for public defenders and equal access to justice. And he also found time for pro bono work, something I think is so important for those who are going to be considered as judges, getting involved in the Vermont family court system, serving as guardian ad litem for children caught up in disputes between their parents.

He has been a tough but fair prosecutor. His Republican credentials—and I will put all that in the record—are very clear: a member of the National Republican Party and so on. He also held one of the most important offices a citizen can hold in Vermont—he was a member of the Select Board of the Town of Chittenden, which is in Rutland County, not Chittenden County. Mr. Hall has proven—I think everybody who has been involved with him as a prosecutor would agree that, there has never been any indication in his work as a prosecutor that anybody is treated differently because of their political affiliation. They are all treated fairly. They are all treated honestly. The public has been served.

So I will put the rest of my statement in, but I also wanted to put in, Mr. Chairman, a letter from our Governor, Governor Douglas, addressed to both Senator Hatch and myself, strongly supporting him.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator CORNYN. Thank you, Senator Leahy, for those remarks.

At this time it is my pleasure to recognize the other Senator from Texas, Senator Hutchison, for any introductory remarks you care to make.

PRESENTATION OF JANE J. BOYLE, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, BY HON. KAY BAILEY HUTCHISON, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator HUTCHISON. Well, thank you very much, Mr. Chairman. I am very pleased to have the opportunity to introduce our candidate, our joint candidate for U.S. District Judge for the Northern District of Texas. It sits in Dallas. Jane Boyle is the current U.S. Attorney for the Northern District of Texas. Previously, she served for 12 years as the U.S. Magistrate Judge for the Northern District of Texas and gained significant judicial experience in the region. She earned her undergraduate degree with honors from my alma mater, the University of Texas at Austin, and she earned her law degree from SMU, Southern Methodist University, School of Law.

She has received outstanding reviews of her job as U.S. Attorney. She took this job at a fairly tough time, and I have talked to lawyers throughout the region who believe that she has done a wonderful job of being totally fair and balanced, and everyone has great confidence in the job that she is doing.

She is married to John Boyle, also an attorney, and has two children: her son, Joe, 15, who just became an Eagle Scout, and her daughter, Casey, is 12.

I would like to ask her to stand and then introduce her family as well. Judge Boyle? And her father—well, let's see. Start with her husband, John Boyle, who is with her. Her father is Raymond Patvel, and her sister, Katie; her mother, Catherine Jackson; and her father, Richard Jackson. And I am sorry, that was her brother-in-law. I am very sorry. That is very nice of you to be here.

So we really are so pleased that all of you are here, and we welcome you.

Mr. Chairman, I know that you join me in giving our highest recommendation to Jane Boyle, and since she is the sitting U.S. Attorney, I would ask for as much of an expedited review of her as possible because we would like to not only fill the judgeship but also fill the U.S. Attorney position so that there is a seamless transition there.

I thank you.

Senator CORNYN. Thank you, Senator Hutchison, and I certainly concur in all of your remarks.

I know Senator Nelson is here, and I am going to defer any introductory remarks I might make so that he can speak, and then I will continue with a few remarks about this excellent nominee for the Northern District of Texas. Senator Nelson?

PRESENTATION OF MARCIA G. COOKE, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA, BY HON. BILL NELSON, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator NELSON. Mr. Chairman, that is very kind of you. Thank you.

I am supposed to be going to Mars this afternoon. We have a hearing on Mars, so thank you for allowing me to go ahead. And I am here on behalf of Marcia Cooke to the United States District Court for the Southern District of Florida, and I am speaking on

behalf of Bob Graham and myself. And if Ms. Cooke would stand up, and her family as well, the members of her family. Thank you all.

Senator CORNYN. Thank you all for being here.

Senator NELSON. Well, Mr. Chairman, our nominee comes to us originally from Michigan, then went to Georgetown University and the Wayne State University Law School. She has been a prosecutor, and at one point, as well as a public defender, plaintiff's attorney, and a defense attorney. She has been in private practice and Government service. She has represented all kinds of clients, the poor and the wealthy. And she was 8 years as a U.S. magistrate judge in Michigan.

She came to Florida and ended up in a legal position for our Governor and became quite familiar then with all of this wonderful diversity that we have in our State. Interestingly, if the Senate confirms the nomination, she will be the first female African-American Federal judge in Florida, and again, an important point to note because of Florida's considerable diversity.

She has been an instructor with the National Institute of Trial Advocacy. She has been an adjunct professor with Wayne State and the University of Miami Law School. And so I will submit this statement for the record, Mr. Chairman, but you can see that we have an extremely qualified candidate that is the nominee, and Senator Graham and I give her our wholehearted endorsement.

[The prepared statement of Senator Nelson appears as a submissions for the record.]

Senator CORNYN. Thank you, Senator Nelson, for those remarks, and of course your written statement, as well as those of the other Senators here today will be made part of the record without objection.

Senator NELSON. Thank you.

PRESENTATION OF JANE J. BOYLE, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS, BY HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. At this time I would like to make a few remarks in addition to those highly glowing remarks that Senator Hutchison has already made about Jane Boyle. She has had a long and distinguished career of public service, and rather than repeat some of the nice things that Senator Hutchison has already said about her, I know particularly if you are Ms. Boyle's family, you cannot hear enough nice things about here, and you agree with all of them.

Let me just read a couple of excerpts from letters that the Committee has received on her behalf. Susan Hayes, Chair of the Dallas County Democratic Party, said, "Having worked on both sides of the bar, I can attest that both sides view Judge Boyle as a respected jurist who will follow the law regardless of any political pressures." And she continued, "If any nominee is deserving of an election year confirmation, it is Judge Boyle." I would also note that a prominent Dallas Democratic Party activist and fund raiser, Mark Stanley, signed on to this letter as well.

I would also like to read excerpts of a letter from Congressman Martin Frost, Democrat from the 24th District of Texas. He noted,

"I believe that she is an extraordinarily qualified candidate who should be confirmed by the Senate with ease. She has a strong legal background and commitment to service in the community, and I believe she will serve on the Federal Bench with honor and distinction."

Finally, I would like to read a few words from Ken Mulberg, the Senior Member of the Texas State Democratic Executive Committee and the former Dallas County Democratic Chair. He said, "It is seldom that I have written in support of a judicial nominee, particularly one submitted by the opposition party. It is more likely you have heard from me in opposition to various nominees. The nomination of Jane Boyle, however, merits different comment." He went on to add, "Judge Boyle possesses an ability to be firm and fair in the adjudicatory process. She was always well studied and prepared in her intellect. Preparedness and perception are top notch." He closed, "I urge a speedy confirmation of this excellent nominee."

Judge Boyle, I just want to add that there were Republicans who said nice things about you too.

[Laughter.]

Senator CORNYN. Without objection, I will submit these letters and another letter from the Texas Employment Lawyers Association to be made a part of the record, without objection.

Would each of the nominees please step forward so I can administer the oath, please? Raise your right hands, please.

Do each of you swear the testimony you are about to give before the Committee is the truth, the whole truth and nothing but the truth, so help you, God?

Judge COOKE. I do.

Mr. HALL. I do.

Mr. KELLEY. I do.

Ms. BOYLE. I do.

Senator CORNYN. Thank you. Please have a seat.

Mr. Hall, we would be glad to hear any opening statements or comments you would care to make.

STATEMENT OF PETER W. HALL, NOMINEE TO BE CIRCUIT JUDGE FOR THE SECOND CIRCUIT

Mr. HALL. Thank you, Mr. Chairman. I do not have any specific opening comments, but I would like, if I may, to take this opportunity to thank the President of the United States for placing my name in nomination, to thank you as Chair for convening this hearing to hear the nomination.

If I may, may I introduce the three persons who are here from Vermont, who have been kind enough to show up to watch this process go forward?

Senator CORNYN. You mean other than the Ranking Member, who I know has already spoken glowingly on your behalf? But please go ahead and do so.

Mr. HALL. Thank you. I would like to introduce Lilly Sojourner and Elizabeth Woodcock, if they would stand up. Ms. Sojourner is a close friend of my daughter's and is here at college at Georgetown, graduating this year. Ms. Woodcock is an Assistant U.S. At-

torney, and has lived here in Washington, came up to Vermont to be an Assistant U.S. Attorney in the Office.

Then the third person here has already been mentioned by Senator Leahy as Charles Tetzlaff, who was my predecessor as U.S. Attorney and a close friend.

Senator CORNYN. Welcome.

Thank you very much for introducing them.

Mr. HALL. Thank you, Mr. Chairman.

[The biographical information of Mr. Hall follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Peter Welles Hall

2. Address: List current place of residence and office address(es).

(Home) Rutland, VT
(Office) United States Attorney's Office
Post Office and Court House
West Street, P.O. Box 10, Rutland, VT 05702

3. Date and place of birth.

November 9, 1948; Hartford, CT

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married - Separated since July 1, 1999

Spouse: Katherine [Romans] Hall
Teacher - Elementary School French
Pittsford Town School District
3447 US Rt. 7, Pittsford, VT 05763

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

University of North Carolina at Chapel Hill,
1967-1971
Degree: B.A. with Honors in English - January 1971

University of North Carolina at Chapel Hill,
(Part-time)1971-1974
Degree: M.A. - Student Personnel Administration in Higher Education - December 1975

Cornell Law School
1974-1977
J.D. *cum laude* - May 1977

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

1971 - Sanford School District, Sanford, North Carolina
High School English Teacher

1971-1974 - University of North Carolina at Chapel Hill
Dean of Men's Office and later Dean of Student Affairs Office - Assistant Dean of Men and later Assistant Dean of Student Affairs (principally a title change)

1975 - Summer - Research Assistant for Professor Robert Blakey, Cornell Law School - Researching United States state and federal gambling laws

1975 - Summer - Self-employed - Ithaca, New York area
House painter and carpenter

1976 - Summer - Cornell Legal Aid, Cornell Law School, Ithaca, NY - Law Clerk

1977-1978 - Hon. Albert W. Coffrin, United States District Judge, U.S. District Court, District of Vermont, Burlington, VT
Law Clerk

1978-1986 - United States Attorney's Office, District of Vermont, Rutland, VT
1978-82 - Assistant U.S. Attorney
1982-86 - First Assistant U.S. Attorney

1986-2001 - Reiber, Kenlan, Schwiebert, Hall & Facey, P.C. (Formerly - Abell, Kenlan, Schwiebert & Hall, P.C. - name changed in 1994), Rutland, VT
Shareholder (Partner)

1986-2001 - 71 Allen Street Associates, Inc., Rutland, VT
Shareholder (Owns the building in which the law firm practices)

1986[approx]-2001 - Proctor, Pittsford, Chittenden (Vermont) Unit of Salvation Army, Chittenden, VT
Treasurer

1986-1989 - Trinity Episcopal Church, Rutland, VT
Member of Vestry and Senior Warden

1987[approx.]-2001 - Allen Pond Associates, Rutland, VT
Partner in real estate venture (owns one office unit)

1989-1994 - Town of Chittenden, Vermont,
Member of Select Board

1989 - Rutland County, Vermont, Republican Committee
Vice Chair
Note - I was variously a member of the Town of Chittenden, Vermont, Rutland County, Vermont, and State of Vermont Republican Party Committees from approximately 1986 to 1993. I believe that 1989 was the only year that I was an officer of any of those committees, but my recollection is hazy; I may have served as an officer of the Town committee as well.

1990-1995 - Vermont Criminal Justice Training Council, Pittsford, VT
Citizen Board Member (Appointed by then Governor Kunin)

1995[approx] and perhaps 1996 - Town of Chittenden, Vermont
Justice of the Peace
Elected (Believe I only did this for one or two years)

1990-1997 - Vermont Bar Association, Montpelier, VT
Member - Board of Managers (served as president in 1995-1996)

1993-2001 - Rutland Regional Medical Center (RRMC), Rutland, VT
Member - Board of Directors (have served as vice chair and chair)

1994-2001 - American Inns of Court, Sterry Waterman Chapter, Royalton, VT
Member - Member of Executive Committee since 1998 (served as president in 1999-2000)

1996-2001 - Rutland Regional Health Services, Inc.(RRHS), (Formerly Comprehensive Health Resources, Inc. [CHRI]) Rutland, VT
Member - Board of Directors (have served as vice chair and am currently chair)

1996-2001 - Rutland Regional Physician-Hospital Organization, Inc., Rutland, VT
Member - Board of Directors (serve as vice chair)

1998-2001 - Attorneys Liability Protection Society (ALPS). Missoula, MT
Member - Board of Directors

2001(April-September) - Vermont Karelia Rule of Law Project (VKROLP), Burlington, VT
Member - Board of Directors

2001-Present - United States Attorney's Office for the District of Vermont, Burlington and Rutland, Vermont
United States Attorney

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

University of North Carolina at Chapel Hill, Morehead Scholar (1967-1971), Phi Beta Kappa (1970); Order of the Golden Fleece (UNC Honorary Society) (1971)

American College of Trial Lawyers, Fellow, (elected 1997)

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

American Bar Association

Vermont Bar Association
1990-1997: Member of Board of Managers
1994-1995: President-Elect
1995-1996: President

Rutland County (Vermont) Bar Association

American College of Trial Lawyers

Defense Research Institute (DRI)

Early Neutral Evaluator, Member of panel of federal mediators/evaluators - U.S. District Court for Vermont ENE Program (1994-2001)

Member, Federal District Court Advisory Committee for the U.S. District Court in Vermont (1998-2001)
Member of civil rules, criminal rules and bankruptcy subcommittees.

Second Circuit Court of Appeals - Member, Merit Selection Panel for U.S. Bankruptcy Court Judge for District of Vermont (1999)

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I believe the following organizations, of which I am a member, engage in some lobbying activities:

National Republican Party

Vermont Republican Party

American Bar Association

Vermont Bar Association

I am a member of the following organization which may engage in some lobbying efforts, although I am not positive that it does:

American College of Trial Lawyers

Other organizations of which I am a member:

Trinity Episcopal Church, Rutland, VT

Chi Psi Fraternity (College fraternity)

Order of the Golden Fleece, University of North Carolina Honorary Society, Chapel Hill, NC

University of North Carolina Alumni Association Chapel Hill, NC

Cornell Law School Alumni Association, Ithaca, NY

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Vermont Supreme Court - 4/4/78

United States District Court for the District of Vermont - 4/4/78

United States Court of Appeals for the Second Circuit - 10/15/79

Supreme Court of the United States - 9/9/94

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

"The Pursuit of Professionalism - Conveying the Message to the Practicing Attorney," The Vermont Bar Journal & Law Digest, Dec. 1990

Six (6) columns, as follows

"The President's Column," The Vermont Bar Journal & Law Digest, Oct. 1995, Dec. 1995, Feb. 1996, Apr. 1996, June 1996, Aug. 1996

Book Review: "*Legal Malpractice,* Fourth Edition," The Vermont Bar Journal & Law Digest, Dec. 1996

(Copies are attached)

Since becoming U.S. Attorney for Vermont, I have given numerous opening and welcoming remarks at various law enforcement functions in Vermont and on occasion at joint law enforcement meetings in Canada. To my knowledge none of those were recorded and they were delivered from notes and not from formally prepared text. On two occasions, however, on the anniversary of September 11, I have given more or less the same speech to two groups of persons being sworn in as new U.S. Citizens.

(A copy of those remarks is attached)

From time to time when I was President of the Vermont Bar Association, I did speak at meetings about the state of that organization, but to my knowledge there were no records kept of those remarks.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. My last complete physical exam was October 28, 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

I have not held any judicial offices.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional

issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

N/a

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

1989-1994 - Town of Chittenden, Vermont,
Member of Select Board
Elected

1990-1995 - Vermont Criminal Justice Training Council,
Pittsford, VT
Citizen Board Member
Appointed by Governor

1995[approx] and perhaps 1996 - Town of Chittenden, Vermont
Justice of the Peace
Elected (Believe I only did this for one or two years)

October 2001-Present - United States Attorney for the
District of Vermont
Appointed

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

Yes.
Judge: Hon. Albert W. Coffrin, United States District Court
for the District of Vermont
Dates: October 1977 - September 1978

2. whether you practiced alone, and if so, the addresses and dates;

I did not practice alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

September 1977 - May 1986 - Government: United States Attorney's Office for the District of Vermont, U.S. Attorney's Office, 3rd Floor, United States Post Office and Courthouse, West Street, Rutland, VT 05701 and Post Office and Federal Building, 11 Elmwood Avenue, Burlington, VT 05401; Assistant United States Attorney

May 1986 - October 2001 - Private Practice: Reiber, Kenlan, Schwiebert, Hall & Facey, P.C.,(f/k/a: Abel, Kenlan, Schwiebert & Hall, P.C.) 71 Allen Street, Rutland, VT; Shareholder (Partner)

October 2001 - Present - Government: United States Attorney's Office for the District of Vermont, U.S. Attorney's Office, 3rd Floor, United States Post Office and Courthouse, West Street, Rutland, VT 05701 and Post Office and Federal Building, 11 Elmwood Avenue, Burlington, VT 05401; United States Attorney

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

September 1978 - May 1986: Assistant United States Attorney in the District of Vermont. I handled criminal prosecutions, forfeitures, civil collections, mortgage foreclosures, and tort defense on behalf of United States.

May 1982 - May 1986: In this four-year period I served as First Assistant U. S. Attorney in the District of Vermont, supervising other attorneys in the office, helping coordinate Law Enforcement Coordinating Committee activities and carrying a full civil and criminal case load, as described above.

May 1986 - October 2001: I was one of two senior litigating "partners" and was responsible for the general litigation, especially commercial, attorney malpractice and professionalism defense and limited criminal defense litigation. The litigation was in the federal and state courts of Vermont and Second Circuit Court of Appeals, and involved both trial and appellate work. Beginning in 1994 I added to my practice a significant component as a mediator in both the federal and state court system.

October 2001 - Present: I have served as United States Attorney for the District of Vermont, leading the office in representing the interests of the United States in court and helping to coordinate cooperative law enforcement efforts in the district, across neighboring districts and with our Canadian law enforcement colleagues. I have handled only portions of a few specific cases in court although, as head of the office, I have participated in discussing and have made decisions about the investigative, litigation and appellate strategies in numerous criminal and civil cases being handled by the office.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

September 1978 - May 1986: My client was the United States of America and/or its agencies.

May 1986 - October 2001: My typical clients were individuals and businesses in Vermont who needed assistance with litigation and/or dispute resolution. A number of my clients have been lawyers. I developed something of a concentration in working for insurance carriers providing malpractice defense for attorneys and in providing related professional responsibility consultation and defense of attorney ethics complaints. I also provided ethics training to the Vermont States Attorneys on a regular basis and assisted prosecutors in the States Attorneys' offices in handling ethics complaints against them. In addition, toward the end of my private practice I often served as a mediator in Vermont cases.

October 2001 - Present: My client has been the United States of America and/or its agencies.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the

frequency of your appearances in court varied, describe each such variance, giving dates.

Frequently as an Assistant United States Attorney up until mid-1986 - I estimate that I appeared on average twice a week.

Less frequently as a private practitioner from mid-1986 to late 2001 - I estimate that I appeared on average two or three times a month.

As United States Attorney I have only appeared in court on a handful of occasions.

2. What percentage of these appearances was in:
(a) federal courts;

September 1978 - May 1986: approximately 95%

May 1986 - October 2001: between 25% and 35%

October 2001 - Present: 100%

(b) state courts of record;

September 1978 - May 1986: approximately 5%

May 1986 - October 2001: between 65% and 75%

October 2001 - Present: 0%

(c) other courts.

Approximately 5% to 10%

3. What percentage of your litigation was:
(a) civil;

September 1978 - May 1986: about 20%

May 1986 - October 2001: about 90%

October 2001 - Present: 0%

(b) criminal.

September 1978 - May 1986: about 80%

May 1986 - October 2001: about 10%

October 2001 - Present: 100%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

ESTIMATED:

25 to 35 where I was sole counsel or chief counsel;

8 to 10 cases where I was associate counsel or co-counsel

5. What percentage of these trials was:
(a) jury;

ESTIMATED: 50% to 60%

(b) non-jury.

ESTIMATED: 40% to 50%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. United States v. Lace, 502 F. Supp. 1021 (D.Vt. 1980), aff'd 669 F. 2d 46 (2d Cir. 1982).

Summary: I participated as an Assistant United States Attorney in helping to represent the Government and prosecuting, beginning in 1979, Vermont's first major drug bust, which netted approximately 100 pounds of marijuana and over 450 pounds of hashish. The search and raid yielding these drugs followed two weeks of "enhanced" optical surveillance by the Vermont State Police, who had used a variety of viewing devices to look into and around the outside of subjects' residence before executing search warrants for the premises. AUSA Karen McAndrew and I successfully defended against suppression motions in a fourteen-day hearing, following which, the principal defendants, Lace and Ducharme, pleaded guilty to engaging in continuing criminal enterprises. They were allowed to enter conditional pleas, preserving the suppression issues for appeal. I represented the Government on the appeal, authoring the brief and arguing the case. Although we came under some criticism from the court of appeals for the way in which we had structured the conditional pleas, the convictions were affirmed.

(a) Date (approx): from 1979 to 1982

(b) District Court: Hon. James Holden, Chief Judge, United States District Court for the District of Vermont (Deceased)

(c) Co-counsel: Karen McAndrew, Dinse, Knapp & McAndrew, P.C., 209 Battery Street, Burlington, VT 05401, 802-864-5751

Opposing Counsel:

Clifford J. Steele, Steele Office Building, 5505 Roswell Road, Atlanta, GA 30342, 404-255-2929

Paul Cambria, Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP 42 Delaware Avenue, Suite 300 Buffalo, New York 14202, 716-849-1333

Robert G. Fierer, formerly Atlanta, GA - could find no listing at this time

Harry Ryan, Ryan, Smith & Carbine, 98 Merchant's Row, Rutland, VT 05701, 802-786-1040

Robert P. McClallen, 110 Merchant's Row, Rutland, VT 802-775-7372

Ellen Mercer Fallon, Langrock, Sperry & Wool, LLP, 111 S. Pleasant Street, Middlebury, VT 05753, 802-388-6356

Lewis K. Sussman, Pierson, Wadhams, Quinn & Yates, 253 S. Union Street, Burlington, VT 05401 802-863-2888

2. Stoddard v. United States, 710 F. 2d 21 (2d Cir. 1983)

Summary: As First Assistant U.S. Attorney for Vermont, I was in charge of obtaining the first Title III wiretap order issued in the District of Vermont and in running related grand jury proceedings. The work was prompted by the murder of a New Jersey State Trooper, and the application involved setting out an extended analysis of what we hypothesized was the communications network used by Raymond Luc Levasseur, Thomas Manning, Richard Williams et al. and a Vermont subject. I was assisted in portions of the process by AUSA George Terwilliger. After disclosure of the Title III inventory, as required by law, the Government successfully defended against the motion of the subject, Sally Stoddard, for additional disclosure of information. I wrote the brief, argued and successfully defended the appeal taken to the Second Circuit. I was assisted in the briefing by other members of the U.S. Attorney's office. After Levasseur and Manning were arrested (several years after the Title III work), I worked with the District of Massachusetts (Robert Mueller) and the Eastern District of New York (Charles Rose) to provide assistance with respect to on-going warrant applications and to protect the underlying materials related to the Title III application.

(a) Date (approx): from 1982 into 1985

(b) District Court: Hon. James Holden, Chief Judge, United States District Court for the District of Vermont (Deceased)

(c) Co-counsel: George J. Terwilliger, III, White & Case, 601 Thirteenth Street, Suite 600 South, Washington, D.C. 20005, 202-626-3600

Opposing Counsel:

Richard Axelrod, Axelrod & Adler, 1194 Main Sreet, St. Johnsbury, VT 05819, 802-748-8161

3. United States v. John Novak, et al., United States District Court ▒ Vermont, Docket No. Cr. 81-49-1, aff'd 729 F.2d 1440 (2d Cir. 1984) (Summary affirmance)

Summary: This was a case in which I joined AUSA Scott McGee as co-counsel for the Government after the initial charges had been brought. It involved multiple defendants charged with a

conspiracy to import marijuana from Columbia, South America, to southern Vermont by way of private air flights into the Bennington Airport. Scott McGee was the principal attorney on the file, although as First Assistant, I came on as full co-counsel to defend against suppression motions requiring a lengthy evidentiary hearing. Scott McGee and I then later tried the case to verdict, which took us approximately eight weeks. There were eight or nine defendants in the case. I recollect that seven went to trial, and we convicted five of the seven. I believe the remaining defendant or defendants pleaded guilty after the first round of convictions. The judgments of conviction were summarily affirmed by the Second Circuit, without opinion. I recall that I assisted in writing the appellee's brief, and I believe that Scott McGee and I both argued the case before the Second Circuit.

(a) Date (approx): from 1982 to 1983

(b) District Court: Hon. James Holden, Chief Judge, United States District Court for the District of Vermont (Deceased)

(c) Co-counsel: P. Scott McGee, Hershenson, Carter, Scott & McGee, P.C., Norwich, VT 05055, 802-295-2800

Opposing Counsel (The records and my memory are sketchy, but these are some of the people who appeared as counsel on the other side):

Joel Steinberg (turned out not to be an admitted attorney; believe he is now serving time for the murder of his adopted daughter)

Norman Blais, 289 College Street, Burlington, VT 05401, 802-865-0095

Edward Thompson, Jr., 6 Atlantic Avenue, East Moriches, New York, 631-874-9000

Barry Griffith, Griffith & Lundeen, P.C., 98 Merchants Row, Rutland, VT 05701, 802-773-7638

Stephen Dardeck, Tepper & Dardeck, 73 Center Street, Ste. 3, Rutland, VT 05701, 802-775-7525

Jeffrey Denner, Denner & Associates, Four Long Fellow Place, Thirty-Fifth Floor, Boston, Massachusetts 02114, 617-227-2800

David Gibson, Brattleboro, VT 05301, 802-254-6011

I know there were other attorneys involved, but I cannot recall them or lay my hands on records and files that will refresh my recollection.

4. United States v. Mankani, 738 F.2d 538 (2d Cir. 1984)

Summary: This case involved prosecution of a conspiracy to smuggle approximately two tons of hashish into the United States. Nine persons were involved as co-defendants. I was the Assistant United States Attorney principally responsible for the prosecution. The case resulted from a cooperative law enforcement effort with the Royal Canadian Mounted Police. A number of defendants, including the ringleader, Peter McFarlane, were Canadians. The Government successfully defended against a substantial motion to suppress evidence. Thereafter, four defendants proceeded to trial before the district court on stipulated facts. Defendant Mankani proceeded to trial before a jury, which I tried on behalf of the Government. At the time of trial, several defendants remained fugitives, I believe; one defendant pleaded guilty and assisted the Government in the case. All defendants who went to trial were convicted. On appeal to the Second Circuit, I wrote the appellee's brief and argued the appeal. I was assisted on the briefing by other members of the U. S. Attorney's office.

(a) Date (approx): from 1982 to mid-1984

(b) United States District Court: Hon. Albert Coffrin, Judge, United States District Court for the District of Vermont (Deceased)

(c) Co-counsel: Not sure I had one, but it may have been Sheila Ware, Darby, Stearns, Thorndike, Kolter & Ware, LLP, 89 S. Main Street, Waterbury VT 05676, 802-244-7352

Opposing Counsel (The records and my memory are sketchy on this one as well, but the following persons did represent defendants in the case):

Nancy Gertner, (now) U.S. District Judge, 1 Courthouse Way, Boston, MA 02210, 617-748-9152 (Clerk's number)

Philip D. Saxer, 135 Governor Peck Road, Jericho, VT 05465, 802-899-2764

Jeffrey Meller, 12 Stardish Road, Watertown, MA 02472, 617-924-5711

William Sessions, (now) U.S. District Judge, United States Post Office and Courthouse, 11 Elmwood Avenue, Burlington, VT 05401, 802-951-6350 (He is listed on the appeal; I do not recall whether he was in the matter when it was in the trial court.)

I know there were other attorneys involved, but at this time I cannot recall them or lay my hands on records and files that will refresh my recollection.

5. Muzzy v. State, 155 Vt. 279, 583 A. 2d 82 (1990)

Summary: This was a case that I handled in private practice. It was a claim by a plaintiff, who had been arrested on charges that should have been dismissed earlier in time as a result of a plea agreement. The claim was brought against the State's Attorney for Rutland County. I represented the State's Attorney. The case proceeded through some limited discovery, and then we prevailed on a summary judgment motion that I filed on behalf of the State's Attorney. The plaintiff appealed the adverse judgment to the Vermont Supreme Court, and I represented the State's Attorney as appellee on the appeal, writing the brief and arguing in the Supreme Court. The judgment was affirmed on appeal. For me, the significant issue in the case which was the basis for our defense, was the reaffirmation (after more recent developments in Vermont case law on the issue of immunity) of the principle of absolute immunity applying to prosecutors' decisions on charges and pleas. That principle was reiterated by the Vermont Supreme Court, although two justices dissented on the issue of whether it applied to the facts of the case.

(a) Date (approx): from 1988 to 1990

(b) Rutland (Vermont) Superior Court: Hon. Arthur O'Dea, Superior Court Judge, (Now in private practice) 113 Old Depot Road, Arlington, VT 05250, 802-375-0037

(c) Co-counsel: None

Opposing Counsel:

John McCamley, Medor & McCamley, 10 Burnham Avenue, Rutland, VT 05701, 802-775-0064 (in trial court)

Michael Ledden, RFD #1, Box 69A, E. Calais, VT 05650, 802-456-1507 (in Supreme Court)

6. In Re: F.L., Chittenden (Vermont) Family Court, Docket No. 19-1-88 CnJ (Final Judgment - Nov. 13, 1990)

Summary: I represented, *pro bono*, a mother who had been separated from and lost her son in the course of a fraudulent

adoption, in which the "adoptive" mother, Wendy Eastman, had made certain promises about what would be the nature of the on-going relationship between the child and his biological mother (my client) and had in fact later faked proof of an adoption. My client, who resided in Pennsylvania at the time, had lost touch with her child for a number of years. He was located in Vermont when the "adoptive" mother was arrested for unrelated crimes. Over the course of several years I was able to help my client regain custody of her son through the Vermont courts. The reunification process was aided along the way by some judges who made courageous decisions and were willing to try some interim, off-beat custody arrangements, and by foster parents who worked miracles in getting mother and child psychologically reunited.

(a) Date (approx): from 1988 through 1990

(b) Chittenden (Vermont) Family Court: Hon. Dean Pineles, District Judge; Hon. Michael Kupersmith, District Judge (contact State District Court judges through the Administrative Judge's Office - Phone 802-476-4797; that office will advise on where to contact the judge on the day of inquiry.)

(c) Co-counsel: None

Opposing Counsel (several of these are counsel who represented the state, which was not taking a position in opposition to my client; NOTE - this was a juvenile matter and specifics are subject to confidentiality requirements):

Lindsey M. Huddle, 72 Hungerford Terrace, Burlington, VT 05401, 802-658-0888

Joe Lang Kershaw, Jr., 622 NE 72nd Street, Miami, FL 33138, 305-751-9970

Joseph A. Farnham, McNeil, Leddy & Sheahan, P.C., 271 S. Union Street, Burlington, VT 05401 802-863-4531

Adele Pastor, Corsones & Corsones, 1 Nickwackett Street, Rutland, VT 05701, 802-775-0125

7. State v. Delaney, 157 Vt. 247, 598 A.2d 138 (1991)

Summary: In this case, I was brought on by my firm as the litigator to defend against an action by the State of Vermont seeking specific enforcement (via preliminary and permanent injunction) of what the State claimed was our client's agreement

to sell a certain large parcel of land to the State. We first prevailed in defeating a preliminary injunction motion seeking to preclude our client from selling the property to another buyer, and we then won at the trial court on a summary judgment motion. I represented the client in the evidentiary hearing for the preliminary injunction motion and assisted my associate, James Goss, in presenting and arguing the summary judgment motion. In addition, I participated in writing the brief and arguing the defense of the appeal to the Vermont Supreme Court, which affirmed the summary judgment. The case was significant to me because I learned the importance of not calling witnesses and not asking questions of witnesses on cross-examination, thus leaving the State unable to meet its burden of proof at the preliminary injunction stage.

(a) Date (approx): from 1989 to 1991
(b) Washington (Vermont) Superior Court: Hon. John Meaker, Superior Court Judge (Retired), 1756 Perry Hill, Waterbury, VT 05676, 802-244-5027

(c) Co-counsel: James Goss, Reiber, Kenlan, Schwiebert, Hall & Facey, P.C., 71 Allen Street, Rutland, VT 05701, 802-773-3300

Opposing Counsel:

William Griffin, Chief Assistant Attorney General, Attorney General's Office, 109 State Street, Montpelier, VT 05602, 802-828-5500

8. New England Educational Training Service v. Silver Street Prshp., 156 Vt. 604, 595 A.2d 1341 (1991)

Summary: This case, when I became involved with it, was part of an ongoing effort by the plaintiff to foreclose a mortgage on property that had been acquired by our firm's client, Silver Street Partnership. Because the matter was a foreclosure action, being tried in equity, it was a trial to the judge. There was one co-defendant and one third-party defendant, an attorney who arguably missed the fact that the mortgage was still on the property when it was initially transferred. Because the plaintiff had already received a substantial sum in connection with the sale of other property that the relevant note and mortgage were intended to secure, we were able to argue successfully at the close of the plaintiff's case that what the plaintiff was doing was seeking to recover excessive liquidated damages. We were thus able to have the entire action dismissed at that point in the case. I tried the underlying case for our

client, and I participated in writing the appellee's brief and argued the defense of the appeal before the Vermont Supreme Court. The Supreme Court affirmed the trial court's decision in our client's favor. For me, the case was significant because it became a basis for the Vermont Supreme Court to rearticulate the standards applied to liquidated damages provisions in contracts and for that Court to state clearly that, when such damages amounted to penalties, they were unconscionable and would not be enforced.

(a) Date (approx): from 1989 to 1991

(b) Bennington (Vermont) Superior Court: Hon. Arthur O'Dea, Superior Court Judge, (Now in private practice) 113 Old Depot Road, Arlington, VT 05250, 802-375-0037

(c) Co-counsel: None

Opposing Counsel:

Thomas Heilmann, Heilmann, Ekman & Associates, Inc., 231 S. Union Street, Burlington, VT 05401, 802-864-4555

Richard Hull (deceased) (he represented a third-party defendant)

John Morrissey, 817 Main Street, Bennington, VT 05201 802-447-2194

9. U.S. Dept. of Interior v. 16.03 Acres of Land, 26 F. 3d 349 (2d Cir. 1994)

Summary: This was the defense of a condemnation action brought by the United States against certain land owned by our clients, the Nelsons. At an evidentiary hearing, we were able to persuade the Government and the United States District Court that the court should review *de novo* the issue of the amount of acreage being condemned. We had a bifurcated proceeding in which the court addressed that issue first and deferred a ruling on the valuation of the condemned property. We persuaded the court to reduce by more than half the size of the acreage condemned by the Government. That decision was reversed on the Government's appeal to the Second Circuit, and a cert. petition filed with the U. S. Supreme Court was denied. On remand, I tried the issue of damages. We persuaded the court that our valuations, rather than the Government's, of the property taken and the damages from the adverse impact on the remainder parcel was the price that the

Government should have to pay for the property. I was assisted in the matters that I handled initially by my former boss in the U. S. Attorney's office. He had been representing the Nelsons at the outset, but when he brought me into the case, I took over primary responsibility for the evidentiary hearings and for the appeals. I consider this case significant because we did well with the trial court on our initial theories of limiting condemnation; I had the opportunity to file a petition for certiorari to the U.S. Supreme Court (my first and only); and we did very well on the issue of damages once the matter was remanded.

(a) Date (approx): from 1991 to 1995

(b) United States District Court: Hon. Franklin S. Billings, Chief Judge (Now Senior Judge), United States District Court for the District of Vermont, P.O. Box 598, Woodstock, VT 05091, 802-457-2321

(c) Co-counsel: George W.F. Cook, 70 Litchfield Avenue, Rutland, VT 05701, 802-773-7888

Opposing Counsel: Christopher Baril, AUSA, U.S. Attorney's Office, Vermont (deceased)

10. Landmark Trust (U.S.A.), Inc. v. John Goodhue, Windsor (Vermont) Superior Court Docket No. S-188-5-96 Wmc; aff'd, Vermont Supreme Court, 172 Vt. 515; 782 A.2d 1219 (2001).

Summary: I represented Landmark Trust (U.S.A.), a preservation organization. On its behalf, we brought a successful declaratory judgment action in Windham (Vermont) Superior Court to confirm, in the face of the guardian Goodhue's arguments to the contrary, that the Landmark Trust was the proper recipient of a valid gift of a million dollar plus apple orchard. The guardian's ward, Fred Holbrook, who was developing Alzheimer's disease at the time, had made the gift to the Trust. Guardian Goodhue, who was Fred Holbrook's fourth cousin, was attempting to undo the gift on the basis that Mr. Holbrook had not been competent to make it. Following a trial to court, the trial court issued a ninety-nine page decision confirming that the donor was competent when he made the gift. That decision was affirmed by the Vermont Supreme Court and is a seminal case in this jurisdiction on analysis of competence in dementia cases.

(a) Date (approx): from 1996 through 2001

(b) Windham (Vermont) Superior Court: Hon. John Wesley, Superior Judge, Allerton Avenue, Brattleboro, VT 05301, 802-254-9042

(c) Co-counsel: Raymond Perra, Weber, Perra & Munzing, P.C., 86 Linden Street, Brattleboro, VT 05201, 802-257-7161;

(On trial memoranda and appellee's brief) Mary E. Grady, 79 Center Street, Rutland, VT 05701, 802-747-3240

Opposing Counsel:

James Anderson, Ryan, Smith & Carbine, 98 Merchant's Row, Rutland, VT 05701, 802-786-1055

Anthony Roisman (Trial counsel), Hershenson, Carter, Scott & McGee, P.C., Norwich, VT 05055, 802-295-2800

Hanson Reynolds (Appellate Counsel), Rackemann, Sawyer & Brewster, One Financial Center, Boston, MA 02111, 617-542-2300

Timothy W. Caldwell (Appellate Counsel), 367 Route 120, Unit B6, Lebanon, NH 03766, 603-643-7577

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

The most recent significant legal activity I have undertaken has been to serve as the U.S. Attorney for Vermont in the two years immediately following September 11, 2001 and, in this job, to assist with enhancing coordination of cooperative law enforcement efforts all along the U.S. border with Canada. I have helped coordinate communications among fellow U.S. Attorneys in districts which have a border with Canada. I have also been able to help lead an effort dealing with cargo container security called "Operation Safe Commerce."

Also outside of litigation, my work in the mid-1980's, under the Reagan administration's Justice Department initiative, in helping to set up and working with the Law Enforcement Coordinating Committee (L.E.C.C.) here in Vermont and my year in 1995-96 as President of the Vermont Bar Association (VBA) are two other significant legal activities in which I have been involved. As one of the lead Assistant U.S. Attorneys on the L.E.C.C. project, I helped the U. S. Attorney establish the first cooperative federal, state and

local drug task force in Vermont. As President of the VBA from September 1995 through August 1996, I had the privilege of being the spokesperson for the lawyers in Vermont, of working with the judiciary on the retention of judges and enhancing a strapped judicial budget, and of traveling to Russia to work with members of the bar and courts in Karelia on several projects to further promote the rule of law in that emerging democracy.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Real Estate Partnership: Allen Pond Associates - on-going real estate partnership with two of my fellow shareholders in my former law firm (This is NOT related to the practice of law). This should wind up shortly since the only condominium office space it held was sold at the end of 2002. There remain several hundred dollars to be distributed among the three partners.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

First, I will identify any case being handled by the United States Attorney's Office for the District of Vermont and will refrain from participating in deciding any case that was in the office before or during my tenure as United States Attorney. In addition, even if a case was not being handled in the office while I was the U.S. Attorney for Vermont, I will refrain from deciding any such case in which that office is a party for a period of two years after I resign as U.S. Attorney.

Second, I will identify any case being handled by my former law firm and will refrain from participating in deciding any case that was in that office during my association with that firm. Further, since I am still in a non-law related real estate partnership with two of my former law partners (see response to Part II, 1, above), I will refrain from deciding any case in which that firm is involved for a period of two years after the final dissolution of the real estate partnership.

Third, with respect to any past or present clients of my former law firm, I will refrain from participating in any case in which those persons or entities are parties for an appropriate period of time.

I expect to review, for purposes of identifying parties, all matters that are referred to me for decision at the time of my arrival at the court and compare that to a list of cases in the U.S. Attorney's Office at the time I leave and to the list of clients from my former firm(as necessary), to the list of entities served by my past board memberships, etc., and to confirm that there do not exist any potential conflicts or appearance of conflicts. I also will review any new matter assigned to me after I arrive, and if any conflict, potential conflict or appearance of conflict exists or arises, I will follow the guidelines of the Code of Judicial Conduct (28 U.S.C. 455).

Regarding categories of litigation that are likely to present potential conflicts, the one I anticipate will need the most attention will be in matters involving the Government as a party arising in the District of Vermont.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No, I have no such plans.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See Financial Disclosure Report and additional information stated in response to the following inquiry.

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

Attached - please note that since my wife and I have been separated for over four years now, I am unable to provide complete information with respect to all matters covered in the financial statement. It is accurate as it applies to me, and estimated values are so noted; I have provided my best estimates insofar as my wife's numbers are concerned where they are provided separately or factored into combined numbers.

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes. In the Summer and Fall of 1986, my wife and I were co-chairs for the Rutland County [Vermont] Committee to Elect Peter Smith. Peter Smith was the Republican candidate for governor that year. We also supported and were associated with Peter Smith's campaign, and I may have been Peter Smith's Rutland County chair, in his successful run for Congress in 1988 and in his unsuccessful run for Congress in 1990, losing to current Representative Bernie Sanders. My responsibilities were to help set up and coordinate the candidate's campaign activities in Rutland County.

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	4,100	Notes payable to banks - secured	0
U.S. Government Securities - add schedule	3,000	Notes payable to banks - unsecured	0
Listed securities - add schedule	20,800	Notes payable to relatives	0
Unlisted securities - add schedule	300	Notes payable to others	0
Accounts and notes receivable:	0	Accounts and bills due	0
Due from relatives and friends	0	Unpaid income tax	0
Due from others	0	Other unpaid tax and interest	0
Doubtful	0	Real estate mortgages payable - add schedule	157,600
Real estate owned - add schedule	423,900	Chattel mortgages and other liens payable	2,650
Real estate mortgages receivable	0	Other debts - Itemize:	
Autos and other personal property	25,000	Credit cards (approx)	25,600
Cash value - life insurance	19,000	Daughter's College Pamt Plan + Expenses	3,850
Other assets - itemize:			
IRA's	31,000		
401(k)	110,000	Total liabilities	189,700
		Net worth	447,400
Total assets	637,100	Total liabilities and net worth	637,100
CONTINGENT LIABILITIES		**GENERAL INFORMATION**	
As endorser, comaker or guarantor	0	Are any assets pledged? (Add schedule)	Yes
On leases or contracts	0	Are you a defendant in any suits or legal actions?	No
Legal Claims	0	Have you ever taken bankruptcy?	No
Provision for Federal Income Tax	0		
Other special debt	0		

(January 2004)

Peter Welles Hall
SSN: [redacted]

FINANCIAL STATEMENT SCHEDULES

U.S. Government Securities:

Daughters: U.S. Savings Bonds (Gifts and part of early savings plan) (estimated)	3,000
	$3,000

Listed Securities:

PWH – 135 shs CIGNA	7,600
PWH – Smith Barney Money Market	200
PWH – 422 shs Nationwide Financial Services	14,000
	$20,800

Unlisted Securities

PWH – 300 shs Xybernaut	**$300**

Peter Welles Hall
SSN: [redacted]

Real Estate:

PWH – Land in Shaftsbury, Vermont (approx value of interest) *	50,000

One-fifth (1/5) undivided interest as a tenant in common with four siblings in real property that was our father's and which we inherited. The property consists of two parcels as follows:

66 acres farm and woodland, Holy Smoke Road, Shaftsbury, VT 05262

251 acres farm and woodland, Maple Hill, East Road, Shaftsbury, VT 05262

PWH/KRH* – Wife's residence and 18 acres 182 Mountain Top Road Chittenden, VT 05737 (grand list value)	243,900
PWH – Personal residence 107 Lincoln Avenue Rutland, VT 05701 (purchase price)	130,000
	$423,900

* Since my wife and I have been separated for over four years now, I have provided my best estimates insofar as my wife's numbers are concerned where they are factored into combined numbers

Real Estate Mortgages Payable:

PWH/KRH – BankNorth Mortgage (Mortgage on Wife's residence) (approx)	48,000
PWH – Charter One Mortgage (Mortgage on personal residence)	109,600
	$157,600

Peter Welles Hall
SSN: [redacted]

Pledged Assets:

PWH – 2000 Ford Crown Victoria
Pledged to Banknorth, N.A. to secure auto loan

(January 2004)

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Over the years I have found that an area of need for free legal services is in the Vermont family court system. Originally I provided legal services to one or the other of the parties. More recently, over the past nine years or so (and particularly up to two years ago), I have regularly served as a Guardian ad Litem or as an attorney for the children caught up in the disputes between the parents. Because this often occurs in cases in which the parents do not have their own attorneys, I have frequently been the only person involved with the case, besides the judge, who has had legal training. While making it clear that I am not an attorney for either of them, I am sometimes able to act as a mediator between the parties.

While serving as U.S. Attorney, I have been given permission to continue to serve as a Guardian ad Litem in two cases that were on-going when I left private practice. One was for a child who had not seen his mother in almost two years and whose mother was trying to enforce her parent-child contact rights; the father had moved to Maine. The other is for three children caught in between on-going disputes between mother and father, both of whom have re-married and yet still manage to hold onto past grudges. Prior to becoming U.S. Attorney, I averaged 50 to 60 hours a year in this work. In the past two years, as the court has issued some decisions affecting the parents' relationships with the children, the time devoted to these matters has been significantly less.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

The set of organizations with which I have had some affiliation growing up and as a parent that might fit this category is the Cub Scouts, Brownies and Girl Scouts. I was a member of Cub Scouts in approximately 1956 or '57 through 1960.

In college, I was a member of Chi Psi Fraternity. The fraternity discriminated in its membership on the basis of sex.

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe

your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

There is not a selection commission active in this jurisdiction for nomination to the position on the Court of Appeals for which I have been nominated. Vermont Governor James Douglas, who has known me and worked with me recently on a variety of drug enforcement and homeland security matters, asked me if I were interested in the position and if he could recommend my name to the White House for consideration. I agreed and was subsequently interviewed by White House Counsel. Following a brief hiatus, Counsel's office contacted me to ask me to speak with Senator Leahy, which I did. Counsel's office then informed me that I would need to go through an FBI background check before the President made a final decision to submit my name to the Senate for confirmation. I was nominated on December 9, 2003.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this ▒judicial activism▒ have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

In my view, in our tripartite form of government established by the United States Constitution, the judiciary is a co-equal branch of that government whose duty it is to hear and decide cases and controversies that arise under the Constitution and under the laws enacted by Congress and signed into law by the

President. In carrying out these responsibilities, the judiciary must be mindful that it is the responsibility and prerogative of the legislative branch of government to enact the laws that apply in most circumstances to a controversy at hand and, in the remaining instances, the final responsibility of the Supreme Court to interpret Constitutional provisions that are applicable. The lower courts are obligated to follow, with the best wisdom they are able to bring to bear, both the intent of the legislative enactments, unless they are determined to be unconstitutional, and also the precedent set by the Supreme Court and the prior undisturbed rulings of the lower court considering the issues.

In the context of the work of the Court of Appeals, I assume that the parties to the case will have raised and briefed any viable arguments regarding standing and ripeness, and that the District Court will have ruled on such issues when raised. Nonetheless, since those issues help define whether there is a real case or controversy before the court, the appellate court must review them when they are raised and must certainly be prepared to decide them when it appears that the parties and the trial court have ignored them. It is important, therefore, that the judiciary be guided by a responsibility to ferret out controlling precedent and then follow it. Nothing is more frustrating to attorneys advising clients or more irritating to those sectors of the public seeking reliable predictions on the legal effect of proposed activity than to be unable to rely on the doctrine of *stare decisis*. It is up to the judiciary to ensure that stability in the legal system

AO-10 Rev. 1/2002	**FINANCIAL DISCLOSURE REPORT** Calendar Year 2003	**Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)**

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Hall, Peter W	Court of Appeals -- 2d Circuit	1/6/2004
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time) Judge, Active	**5. ReportType** (check appropriate type) (•) Nomination, Date 12/9/2003 ( ) Initial ( ) Annual ( ) Final	**6. Reporting Period** 1/1/2003 to 12/31/2003
7. Chambers or Office Address U.S. Attorney's Office P.O. Box 10 Rutland, VT 05702-0010	**8.** On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations. Reviewing Officer_____ Date_____	

IMPORTANT NOTES. The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only, see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	General Partner (no active management)	Allen Pond Associates, Rutland, VT

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	2001	Shareholders in former law firm, Kenlan, Schwiebert & Facey, P.C.; continued participation (for management only) in Law Firm vested 401(k) retirement fund

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ NONE - (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2002	Kenlan, Schwiebert & Facey, P.C., (former law firm) - payment of final amount owed for work in progress prior to 10/05/01	$10,580

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Hall, Peter W	1/6/2004

IV. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	MBNA-America	Credit Card	K
2.	Academic Management Services	Tuition payment plan for daughter's college tuition	J

FINANCIAL DISCLOSURE REPORT
Page 1 of 1

Name of Person Reporting	Date of Report
Hall, Peter W	1/6/2004

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div., rent, or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ NONE (No reportable income, assets, or transactions)									
1. CIGNA (common)	A	Dividend	J	T	Exempt				
2. Natwide Financial Services (common)	A	Dividend	K	S	Exempt				
3. IRA: Fidelity Asset Manager Mutual Fund	A	Dividend	K	T	Exempt				
4. Manulife Financial - U.S. Government Securities Fund (VS)	A	Dividend	M	T	Exempt				
5. 1/3 gen'l prtnrshp interest: Allen Pond Assoc., Rutland, VT	A	Distribution	J	T	Exempt				
6. 1/5 undiv. int. w/ siblings in timber & land, Shaftsbury, VT		None	L	W	Exempt				
7. Dependent daughter's U.S. Savings bonds		None	J	T	Exempt				
8. Nationwide Fin. Servs. whole life policy	A	Dividend	K	U	Exempt				
9. Mass Mutual whole life insurance policy	A	Dividend	J	U	Exempt				

1 Income/Gain Codes (See Columns B1 and D4): A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000

2. Value Codes (See Columns C1 and D3): J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000

3 Value Method Codes (See Column C2): Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash/Market; U = Book Value; V = Other; W = Estimated

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Hall, Peter W	1/6/2004

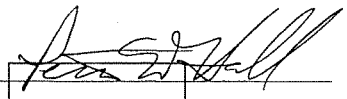
VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Hall, Peter W	1/6/2004

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature  Date 1/6/04

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

Senator CORNYN. Professor Kelley, we would be glad to hear any opening comments or statement you care to make.

STATEMENT OF WALTER D. KELLEY, JR., NOMINEE TO BE DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

Mr. KELLEY. I do not have any opening statement, Senator. I too would like to thank President Bush and this Committee, President Bush for the nomination, this Committee for affording me the opportunity to have a hearing, and look forward to answering your questions.

[The biographical information of Mr. Kelley follows:]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. **Full name (include any former names used.)**

Walter DeKalb Kelley, Jr.

2. **Address: List current place of residence and office address(es).**

Residence

Norfolk, VA

Office

TROUTMAN SANDERS LLP
150 West Main Street, Suite 1600
Norfolk, VA 23510

3. **Date and place of birth.**

Born on July 28, 1955 in Norfolk, Virginia

4. **Marital Status: (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).**

Married since June 4, 1988 to the former Jennifer Taylor James of Nassawadox, Virginia.

My wife is studying for a Masters Degree in architecture at Hampton University. She is not employed outside the home at this time.

5. **Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.**

Washington & Lee University (attended from August 1973 to June 1977)	B.A., cum laude, 1977
Washington & Lee University (attended from August 1978 to May 1981)	J.D., magna cum laude, 1981

6. **Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.**

Date	Employer/Organization	Position
1/03 to Present	Regent University	Adjunct Professor of Law
2002 to Present	Tusk & Trunk PAC	Director
5/01 to Present	Troutman Sanders LLP	Partner
2000 to Present	Old Dominion University	Rector ('00 & '01) and Member of Board of Visitors
1999 to Present	Norfolk Botanical Garden Foundation	Director
1999 to Present	Kelley Family Investments, LLC	Manager (1% ownership)
1998 to Present	Note Purchase Co., LC	Manager (100% ownership
1998 to Present	Downtown Republican Club	Director
1997 to Present	KMK Factoring, LLC	Manager (5% ownership)
1997 to Present	South Trust Bank Advisory Board	Director
1991 to Present	Salvation Army Adult Rehabilitation Center Advisory Board	Chair ('94-'98) and Director
1985 to Present	Diversified Investments, L.P.	General Partner (0.5% ownership)
1990 to 2003	Norfolk Collegiate School	Trustee
1997 to 2000	Republican Party of Norfolk	Chairman
1982 to 2001	Willcox & Savage, P.C.	Associate/Member
1988 to 1996	Washington & Lee Law Alumni Ass'n	President ('92-'93) and Director
8/81 to 8/82	U.S. Courts/Hon. Ellsworth Van Graafeiland	Law Clerk
7/81 to 8/81	King & Spalding	Summer Associate
6/80 to 8/80	Cadwalader Wickersham & Taft	Summer Associate
6/79 to 8/79	Jett, Agelasto, Berkley, Furr & Price	Summer Associate
7/77 to 7/78	U.S. Congress/Hon. James M. Collins	Press Secretary

7. **Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.**

No.

8. **Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.**

Law School

- Graduated *Magna Cum Laude*
- Order of the Coif
- Lead Articles Editor of W&L Law Review
- Omicron Delta Kappa

Private Practice

- Rated AV by Martindale-Hubbell
- Listed since 1997 in The Best Lawyers in America for business litigation
- Voted one of "The Legal Elite," for civil litigation in Virginia Business magazine's 2000 through 2003 annual surveys
- Master of James Kent American Inn of Court
- Commissioner in Chancery for the Circuit Court of the City of Norfolk

9. **Bar Association: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.**

AMERICAN BAR ASSOCIATION
- House of Delegates (1989 - 91)

VIRGINIA STATE BAR
- Chairman, Section on Antitrust, Franchise and Trade Regulation Law (1990 - 91)
- President, Young Lawyers Conference (1988 - 89)

VIRGINIA BAR ASSOCIATION

NORFOLK & PORTSMOUTH BAR ASSOCIATION

JAMES KENT AMERICAN INN OF COURT
- Master

10. **Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.**

Lobbying Organizations

Virginia Business Higher Education Council

Other Organizations

Norfolk Yacht & Country Club
The Harbor Club
The Virginia Club
Town Point Club
Norfolk Botanical Garden Foundation
Republican Party of Norfolk
Tusk and Trunk PAC
Downtown Republican Club
First Presbyterian Church of Norfolk

11. **Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please give the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.**

1982 - Present
- Virginia Supreme Court and all lower courts
- United States District Court for the Eastern District of Virginia
- United States Court of Appeals for the Fourth Circuit

1984 to Present
- United States District Court for the Western District of Virginia

1992 to Present
- United States Court of Appeals for the Ninth Circuit

1993 to Present
- Supreme Court of the United States

2002 to Present
- United States Court of Appeals for the Federal Circuit

12. **Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.**

PUBLICATIONS

- W. Kelley, *Recovery of Lost Profits in Virginia*, VSB Litigation News – Vol. IV No. 3 (Fall 1997).
- W. Kelley, *Exceptions to the Recovery of Lost Profits in Virginia*, VSB Litigation News – Vol. IV No. 4 (Winter 1998).
- Antitrust And The Media (co-author). This three-hundred page compendium is published annually by the Practicing Law Institute as part of the program materials of Communications Law Seminar.
- Vertical Restraints And Other Distribution Issues. This outline was published by the Virginia Law Foundation in 1990 as part of a Continuing Legal Education lecture series.
- Antitrust Law In Virginia: A Comprehensive Digest of Federal and State Antitrust Decisions and Developments. (Contributing Editor). Published by the Virginia State Bar Antitrust Law Section in 1989.
- Overview of Federal and Virginia Law Concerning Experts. This monograph was published by the Norfolk-Portsmouth Bar Ass'n in 1989.
- W. Kelley, *Antitrust Compliance Programs: They're Not Just For Big Business Anymore*, 35 Va. Bar News 19 (Oct. 1986).
- Note, *Rule 10b-5: The Circuits Debate the Exclusivity of Remedies, the Purchaser-Seller Requirement, and Constructive Deception*, 37 Wash. & Lee L. Rev. 877 (1980).

SEMINAR MATERIALS/FACULTY

- *Architectural Copyright Law: Current Trends and Tips*, presented to the National Association of Home Builders annual meeting (Las Vegas, NV) in January 2003
- *Architectural Copyright Law and Practice*, presented to the Virginia Society of the American Institute of Architects annual meeting (Richmond, VA) in November 2002
- *Insider Tips and Tricks of the Trade: What Every Young Litigator Should Know*, presented to the Virginia Bar Association's 112th Annual Meeting (January 2002)
- Chair, *Disputes in Closely Held Businesses*, sponsored by Committee on

Continuing Legal Education of the Virginia Law Foundation. Presented in Richmond and McLean, Virginia in February 2001.

- "*Antitrust, Franchise and Trade Regulation Law*," sponsored by Committee on Continuing Legal Education of the Virginia Law Foundation in 1990.

- "*Basics of Choosing and Examining Experts*," sponsored by the Continuing Legal Education Committee of the Norfolk-Portsmouth Bar Ass'n in 1989.

SPEECHES

- None on legal topics or from a prepared text

13. **Health: What is the present state of your health? List the date of your last physical examination.**

I am in excellent health. My last physical examination was October 28, 2003.

14. **Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.**

None.

15. Citations: **If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.**

Not Applicable

16. **Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.**

None.

17. **Legal Career:**

a. Describe chronologically your law practice and experience after graduation from law school including:

1. Whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I clerked from August 1981 to August 1982 for the Hon. Ellsworth A. Van Graafeiland, a judge on the United States Court of Appeals for the Second Circuit.

2. Whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. The dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

Date	Firm/Address	Position
5/01 - Present	TROUTMAN SANDERS LLP 150 West Main Street, Suite 1600 Norfolk, VA 23510 757/687-7791	Partner
9/82 - 4/01	WILLCOX & SAVAGE, P.C. 1800 Bank of America Building Norfolk, VA 23510 757/628-5500	Associate/Partner

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Business litigation with particular emphasis on intellectual property litigation, antitrust law and disputes in closely held businesses.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Typical clients range from publicly traded companies (Yahoo!, Inc., Cox Communications, Inc., Alpharma, Inc.) to closely held businesses of varying size (Kipp ✱ Flores, LLC, Petris Technology, Inc., Kellam Energy, Inc., Olan Mills, Inc.) to individual business persons (Wayne McLeskey, George Kaufman, Gray Kiger, John Hewitt).

c. 1. Did you appear in court frequently, occasionally, or not at all? If the

frequency of your appearances in court varied, describe each such variance, giving dates.

I have appeared in court frequently since 1982.

2. **What percentage of these appearances was in:**
   - (a) **Federal courts;** 75%
   - (b) **State courts of record;** 25%
   - (c) **Other courts.** N/A

3. **What percentage of your litigation was:**
   - (a) **Civil;** 100% in last 5 years
   - (b) **Criminal; 0% in last 5 years.**

4. **State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.**

   I have tried to verdict approximately 25-30 cases as chief counsel or sole counsel.

5. **What percentage of these trials was:**
   - (a) **Jury;** 60%
   - (b) **Non-jury.**
     40%

18. **Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:**

   (a) **The date of representation;**

   (b) **The name of the court and the name of the judge or judges before whom the case was litigated; and**

   (c) **The individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.**

- *Kipp ✶ Flores, L.L.C. v. Signature Homes, L.L.C., et al.*, Civil Action No. 2:00cv831 (E.D.Va. 2001). I was lead counsel for the plaintiff in this architectural copyright infringement case. The defendants were home builders who constructed 350 homes using Kipp-Flores' (my client) plans. After a two week trial, the jury awarded Kipp-Flores $5.2 million. This was the second largest verdict in Virginia in 2001. The case settled on appeal.

The case was referred to me by Louis Bonham (see below), who served as co-counsel.

a. Filed on 11/6/00; appeal dismissed on 4/1/02.

b. USDC/E.D. Va., Norfolk Division; Judge Rebecca Beach Smith

c. Co-counsel: Louis K. Bonham, Esquire
ROSENTHAL & OSHA
One Houston Center
Suite 2800
1221 McKinney Street
Houston, TX 77010
(713) 228-8600

Opposing Counsel: Alan S. Reynolds, Jr., Esquire
REYNOLDS, SMITH & WINTERS, P.C.
500 E. Plume Street
Suite 800
Norfolk, VA 23514
(757) 622-3111

- *Sweetwater Chemical Company v. Technical Products Corporation*, 1992 U.S. App. LEXIS 33363 (9th Cir.) I was lead counsel for the defendant in this patent licensing action. To settle a patent infringement suit, Technical Products (my client) granted plaintiff a limited license to sell the patented product. Plaintiff later sued, claiming that Technical Products was interfering with its rights under the licensing agreement.

Plaintiff's claim was dismissed on the first day of trial for lack of a proper party. The Court awarded Technical Products its attorney's fees. Plaintiff's appeal was dismissed after argument before the United States Court of Appeals for the Ninth Circuit in San Francisco.

Steve Schwartz (see below) served as local counsel in the district court. I tried the case and argued the appeal.

a. Filed on 7/11/89; opinion dismissing the appeal on 12/8/92.

b. USDC/C.D. Cal; Judge John G. Davies (Retired)

c. Co-Counsel: Steve Schwartz, Esquire
SCHWARTZ & JANZEN
12100 Wilshire Blvd.
Los Angeles, CA 90025

(310) 979-4090

Opposing Counsel: Bruce B. Brunda, Esquire
STETINA BRUNDA GARRED & BRUCKNER
75 Enterprise, Suite 250
Aliso Viejo, California 92656
(949) 855-1246

- *Kellam Energy, Inc. v. Duncan*, 668 F. Supp. 861 (D. Del. 1987). I served as lead counsel for the plaintiff, Kellam Energy. Kellam Energy was both a wholesale distributor and a retailer of gasoline on the Delmarva Peninsula. As part of its business, Kellam Energy installed gasoline tanks and pumps at the locations of independent retailers in exchange for the retailer signing a 15 year gasoline requirements contract.

  Kellam Energy sued the defendant to enforce seven (7) of these requirements contracts. The defendant counterclaimed for monopolization, attempt to monopolize, retail price fixing, tying and illegal exclusive dealing. All of the antitrust claims were dismissed on summary judgment except the retail price fixing and attempted monopolization claims.

  After a six week trial, the jury found in favor of Kellam Energy on its breach of contract claims and awarded both compensatory and punitive damages. The jury found against defendant on its antitrust counterclaims. The case settled on appeal.

  I took over as lead counsel for Kellam Energy approximately one year after the case was filed. In handling the case, I worked with my then law partner, Hugh Patterson (see below). W. Harding Drane, Jr. (see below) served as local counsel.

  a. Filed in 1984; appeal dismissed in 8/88.

  b. U.S.D.C./D. Del.; Judge Caleb M. Wright (deceased)

  c. Co-counsel: Hugh M. Patterson, Esquire
  WILLCOX & SAVAGE, P.C.
  1800 Bank of America Center
  Norfolk, Virginia 23510
  (757) 628-5557

  W. Harding Drane, Jr., Esquire
  POTTER ANDERSON & CORROON
  Hercules Plaza
  1313 N. Market Street
  P.O. Box 951
  Wilmington, DE 19899
  (302) 984-6019

Opposing Counsel: William J. Wier, Jr., Esquire
55 Indian Field Road
Wilmington, Delaware 19810
(302) 475-6751

- *Steven Jay Photography, Ltd. v. Olan Mills, Inc.*, 713 F. Supp. 937 (E.D.Va. 1989), aff'd, 903 F.2d 988 (4th Cir. 1990). I served as lead counsel for the defendant, Olan Mills, Inc., in this antitrust action. The plaintiff, a competing photographer, challenged Olan Mills' practice of making payments to public high schools in exchange for the right to be the "official" senior photographer.

  The district court and Fourth Circuit held that Olan Mills' payments did not constitute illegal brokerages or commercial bribery prohibited by section 2(c) of the Robinson-Patman Act. In ruling for Olan Mills, both courts rejected two contrary Virginia Attorney General opinions squarely on point. I handled the case with the assistance of my then partner, Conrad Shumadine (see below).

  a. Filed on 10/11/88; appellate opinion on 5/15/90.

  b. U.S.D.C./E.D. Va., Norfolk Division; Judge J. Calvitt Clarke (Retired)

  c. Co-counsel: Conrad M. Shumadine, Esquire
  WILLCOX & SAVAGE, P.C.
  1800 Bank of America Center
  Norfolk, Virginia 23510
  (757) 628-5525

  Opposing Counsel: Hon. William P. Williams
  NORFOLK JUVENILE & DOMESTIC
  RELATIONS COURT
  800 E. City Hall Avenue
  Norfolk, VA 23510
  (757) 664-9301

- *Levine v. McLeskey*, 881 F. Supp. 1030 (E.D.Va. 1995), affirmed in part, vacated in part, 164 F.3d 210 (4th Cir. 1998). I was lead counsel for Wayne McLeskey, who was the sole defendant in this $200 million antitrust action involving the marina and real estate industries. The plaintiff was a competing real estate developer and the owner of a dry storage marina located immediately next to a dry storage marina owned by Mr. McLeskey. The plaintiff in essence alleged that Mr. McLeskey tried to run her marina (and the accompanying development) out of business.

  The District Court granted summary judgment for the defendant on all counts. The Fourth Circuit reversed that portion of the district court's ruling that relied on

collateral estoppel from a prior state court action. The case was settled before the effect of the collateral estoppel ruling could be addressed on remand.

I served as lead counsel, but handled the case with the assistance of a number of lawyers at Willcox & Savage, P.C. The most prominent of the attorneys helping me on the case was my then partner, Conrad Shumadine (see below).

a. Filed on 5/19/94; dismissed agreed on 10/15/99.

b. U.S.D.C/Norfolk Division; Judge Raymond A. Jackson

c. Co-counsel: Conrad M. Shumadine, Esquire
WILLCOX & SAVAGE, P.C.
1800 Bank of America Center
Norfolk, Virginia 23510
(757) 628-5525

Opposing Counsel: Wyatt B. Durrette, Jr., Esquire
DURRETTE, IRVIN & BRADSHAW
Main Street Centre
20th Floor
600 E. Main Street
Richmond, VA 23219
(804) 775-6900

- *Cranbrook Investors, Ltd. v. Great Atlantic Management Co.*, 1999 WL 1020534 (4th Cir., Nov. 10, 1999). I represented Cranbrook Investors, the plaintiff/appellant in this multimillion dollar case. Cranbrook Investors paid $10 million to purchase a limited partnership interest in the entity that owned the Cranbrook apartments in Fort Lauderdale, Fla. Defendant Great Atlantic was the general partner and managed the apartment complex.

When the Cranbrook investment soured, Great Atlantic offered to let Cranbrook Investors swap its limited partnership interest for equity in another Great Atlantic sponsored limited partnership that owned a different real estate project. The parties signed a letter agreement memorializing their deal, but Great Atlantic refused to produce the limited partnership documents necessary to finalize the deal.

Cranbrook Investors sued to enforce the parties' letter agreement. Great Atlantic asserted that the letter was merely an "agreement to agree" and hence unenforceable. The district court granted summary judgment in favor of Great Atlantic. The Fourth Circuit reversed and ordered a trial. The case settled on remand.

I was lead counsel in the district court proceedings and argued the appeal. I was

assisted by Michael Katchmark (see below), who was then an associate at Willcox & Savage.

a. Filed on 8/15/97; dismissed agreed on 5/8/00.

b. U.S.D.C./E.D. Va., Newport News Division; Judge Raymond Jackson and Magistrate Judge James Bradberry

/c. Co-counsel: Michael R. Katchmark, Esquire
WILLCOX & SAVAGE, P.C.
1800 Bank of America Center
Norfolk, Virginia 23510
(757) 628-5500

Opposing Counsel: C. Frederick Witthoefft, Esquire
HIRSCHLER, FLEISHER, WEINBERG, COX & ALLEN
Federal Reserve Building
701 East Byrd Street
P.O. Box 500
Richmond, VA 23218
(804) 771-9500

- *National Sweetwater, Inc. v. Technical Products Corporation*, Case No. 90-cv-1533 (N.D. Oh., Dec. 20, 1991). I served as lead counsel for defendant Technical Products, a specialty chemical manufacturer. The plaintiff was a competing manufacturer. The case involved Technical Products' exclusive dealing contracts with certain chemical suppliers and blenders in the Mid-west.

  The plaintiff asserted that the exclusive dealing contracts precluded it from entering the market and constituted acts of monopolization. The District Court granted summary judgment in favor of Technical Products, ruling that a monopolist does not have to share its advantageous supply arrangements with competitors if alternatives (albeit more expensive ones) are available. The case was not appealed.

  I handled the case with the assistance of John Eklund (see below), who served as local counsel

  a. Filed on 8/28/90; judgment for the defendant on 12/20/91.

  b. U.S.D.C./N.D. Ohio; Judge Sam H. Bell

  c. Co-counsel: John J. Eklund, Esquire
  CALFEE, HALTER & GRISWOLD LLP

1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114
(216) 622-8200

Opposing Counsel: Raymond G. Hernacki, Esquire
793 Bolsana Drive
Laguna Beach, CA 92651
(714) 499-2155

Bruce B. Brunda, Esquire
STETINA BRUNDA GARRED & BRUCKNER
75 Enterprise, Suite 250
Aliso Viejo, California 92656
(949) 855-1246

- *McLeskey v. Davis Boat Works, Inc.*, 2000 WL 1008793 (4th Cir., July 21, 2000). I became counsel for the plaintiff/appellant on appeal. The case involved a profit sharing agreement between a manager (my client, Kenneth McLeskey) and a yacht brokerage company. The district court granted summary judgment on Mr. McLeskey's claim that the officers/directors of the yacht brokerage company should be personally liable for the debt because the company had been dissolved by the North Carolina Secretary of State.

The Fourth Circuit reversed this ruling and also reversed the district court's grant of summary judgment of Mr. McLeskey's piercing the corporate veil claim. On remand, the district court granted summary judgment in Mr. McLeskey's favor on his claim that the officers/directors were personally liable because they operated through a dissolved corporation.

I argued the Fourth Circuit appeal. I was assisted in the district court by Everett Thompson (see below), who served as local counsel.

a. Filed on 4/1/96; final judgment in favor of plaintiff entered on 8/14/00.

b. U.S.D.C./E.D.N.C., Elizabeth City Division; Judge Terrance Boyle

c. Co-counsel: C. Everett Thompson, II, Esquire
208 North Road Street
Elizabeth City, NC 27909
(252) 335-7200

Opposing Counsel: Jeffery J. Malarney, Esquire
115 Garden Drive
Manteo, North Carolina 27954

(252) 202-4040

- *Daughtrey v. Ashe*, 243 Va. 73, 413 S.E.2d 336 (1992). I represented the plaintiff/appellant, Hayes Daughtrey, in this unique case involving appraised diamonds. It was undisputed that the diamonds Mr. Daughtrey purchased from the defendant were not of the grade and quality set forth on the accompanying appraisal. Nevertheless, the trial court entered judgment for the defendant on reliance grounds because Mr. Daughtrey could not prove that he reviewed the appraisal prior to tendering the purchase money. The Virginia Supreme Court, in a case of first impression, reversed and held that section 2-313 of the Uniform Commercial Code does not require proof of causal reliance.

  a. Filed on 5/8/89; final dismissal in 6/92.

  b. Circuit Court of the City of Norfolk, Virginia; Judge Leonard B. Sachs (Retired)

  c. Co-counsel: None

  Opposing Counsel: Michael I. Ashe, Esquire
  MICHAEL I. ASHE, P.C.
  713 19th Street
  Suite 101
  Virginia Beach, Virginia 23451
  (757) 422-1278

- *Beam Laser Systems, Inc., et al. v. Cox Communications, Inc., et al.*, 117 F. Supp. 2d 515 and 144 F. Supp. 2d 475 (E.D. Va. 2001) I served as co-counsel for Cox Communications, Inc. and Seachange International, Inc. in defending against claims that Seachange's system for inserting advertising into cable television programming infringed plaintiff's patent. The Court granted summary judgment in favor of defendants after a three day *Markman* hearing.

  Steve Bauer (see below) handled the case together.

  a. Filed on 3/17/00; appeal dismissed on 7/9/01.

  b. U.S.D.C./E.D. Va., Norfolk Division; Judge Rebecca Beach Smith

  c. Co-counsel: Steven M. Bauer, Esquire
  TESTA, HURWITZ & THIBEAULT
  125 High Street
  Boston, MA 02110
  (617) 248-7594

Opposing Counsel: Steven E. Adkins, Esquire
SHAW PITTMAN LLP
1650 Tyson Blvd.
McLean, VA 22102
(703) 770-7573

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

While engaged in private practice, I have participated in legal matters as a leader in Bar activities, a mentor to younger attorneys, a quasi-judge of the Norfolk Circuit Court and as a law professor.

In the 1980s, I was very involved with the Virginia State Bar. After years of service, I was elected President of the Young Lawyers Conference in 1988. In this position, I participated in governance of the State Bar and was responsible for the myriad of programs delegated to the Young Lawyers Conference. Two years later, again after years of service on the Board, I was elected Chairman of the Virginia State Bar's Section on Antitrust, Franchise and Trade Regulation law. The Section produced programs on trade regulation law and published a digest of antitrust opinions in the Fourth Circuit.

My experience in litigating antitrust cases and as Chairman of the Antitrust Section prompted the Dean of the Regent University Law School to ask me to become an adjunct professor on the subject. I now teach a two-hour antitrust course at Regent in the spring semester. This allows me to stay current in the subject matter and mentor law students. I also mentor young lawyers as a Master of the local chapter of the James Kent American Inn of Court.

While I practice principally in federal court, a substantial number of my state court cases are heard in Norfolk Circuit Court. In the late 1990s, the judges of that court asked me to become a Commissioner in Chancery. This is a quasi-judicial position created by statute (Va. Code §8.01-607). The judges refer complicated equity cases to the Commissioners for reports and recommendations on how to rule. As part of the referral, Commissioners conduct evidentiary hearings and rule on discovery motions. The cases in which I have served as a Commissioner in Chancery range from disputes in closely held businesses to the revocation of a trust.

In addition to the cases listed in response to question 18, I was lead counsel in the following significant cases that settled prior to judicial decision.

- *Grimstead v. Barrick*, Civil Action No. 2:02cv535. I was lead counsel for the

plaintiff architect in this action involving the infringement of copyrighted architectural plans. The case was settled on the eve of trial. The amount of the settlement is confidential.

a. Filed on 7/3/02; dismissed agreed on 6/24/03.

b. U.S.D.C./E.D. Va., Norfolk Division - Judge Henry Coke Morgan, Jr.

c. Co-Counsel: Louis K. Bonham, Esquire
ROSENTHAL & OSHA
One Houston Center
Suite 2800
1221 McKinney Street
Houston, TX 77010
(713) 228-8600

Opposing Counsel: Glen M. Robertson, Esquire
PAYNE, GATES, FARTHING & RADD, P.C.
1515 Dominion Tower
Norfolk, VA 23510
(757) 640-1500

- *Science Applications International Corp. v. Petris Technology, Inc.*, Civil Action No. 01-1857-A (E.D. Va.). I was lead counsel for the defendant in an action involving the alleged infringement of copyrighted computer source code. The case was settled before the argument on defendant's motion for summary judgment.

a. Filed on 12/10/01; dismissed agreed on 11/21/02.

b. U.S.D.C./E.D. Va., Alexandria Division - Judge Leonie Brinkema and Magistrate Judge Thomas Rawles Jones

c. Co-Counsel: Patrick Zummo, Esquire
ZUMMO, MITCHELL & PERRY
333 Clay
Suite 4100
Houston, TX 77002
(713) 651-0590

Opposing Counsel: Charles L. Babcock, Esquire
JACKSON WALKER LLP
1401 McKinney
Suite 1900
Houston, Texas 77010

(713) 752-4200

- *Decipher, Inc. v. David Yearick, et al.*, Civil Action No. 2:01cv450 (E.D. Va.). I was lead counsel for the defendant in this copyright infringement action. The case involved the board game "This vs. That" which is now sold in Starbucks' coffee shops nationwide. The case settled on the eve of trial through cross-licensing agreements that allowed each litigant to share in profits from sale of the game.

  a. Filed on 6/21/01; dismissed agreed on 3/11/02.

  b. U.S.D.C./E.D. Va., Norfolk Division - Judge Jerome B. Friedman

  c. Co-Counsel: None

  Opposing Counsel: Stephen E. Noona, Esquire
  KAUFMAN & CANOLES, P.C.
  150 W. Main Street
  Suite 2100
  Norfolk, VA 23510
  (757) 624-3272

- *Vimax Industries, Inc., et al. v. Hoechst Celanse Corporation.* I served as co-counsel for the plaintiff in this antitrust action involving a chemical company that was the target of anticompetitive acts undertaken by an international cartel. The case settled at an early stage in the litigation. Terms of the settlement are confidential.

  a. Filed on 2/2/94; dismissed agreed on 7/5/94.

  b. U.S.D.C./E.D. Va., Norfolk Division - Unassigned

  c. Co-counsel: Conrad M. Shumadine, Esquire
  WILLCOX & SAVAGE, P.C.
  1800 Bank of America Center
  Norfolk, VA 23510
  (757) 628-5525

  Opposing Counsel: John R. Crumpler, Jr., Esquire
  KAUFMAN & CANOLES, P.C.
  150 W. Main Street

Suite 2100
Norfolk, VA 23510
(757) 624-3103

- *Robert J. Kubicki & Janice A. Kubicki and RJK of Gloucester, Inc. v. McDonald's Corporation, et al.*, Civil Action No. 4:93cv00072. I was lead counsel for the plaintiffs, who were owners of 18 McDonalds franchises. The lawsuit involved McDonald's attempts to terminate those franchises. The case was settled through a multi-million dollar buyout of the franchisees.

  a. Filed on 6/2/93; dismissed agreed on 7/19/94.

  b. U.S.D.C./E.D. Va., Newport News Division – Magistrate Judge James Bradberry

  c. Co-counsel: Jeffrey H. Gray, Esquire
  WILCOX & SAVAGE, P.C.
  222 Central Park Avenue
  Suite 1500
  Virginia Beach, Virginia 23462
  (757) 628-5516

  Opposing Counsel: Thomas G. Slater, Jr., Esquire
  HUNTON & WILLIAMS LLP
  951 East Byrd Street
  Richmond, Virginia 23219
  (804) 788-8200

- *Virginia Investors Assoc., et al. v. Guest Quarters Hotels, L.P., et al.*, Civil Action No. 90-1281-N. I was lead counsel for a hotel owner/franchisee in litigation involving the franchisor's breach of both the franchise agreement and various management agreements. The case was settled by termination of the management agreements and a buyout of the franchisee's interest in certain jointly owned hotels.

  a. Filed on 5/3/90; dismissed agreed in 4/91.

  b. U.S.D.C./E.D. Va., Norfolk Division - Judge Richard Kellam (deceased)

  c. Co-counsel: John Y. Pearson, Jr., Esquire
  WILLCOX & SAVAGE, P.C.
  1800 Bank of America Center
  Norfolk, Virginia 23510
  (757) 628-5503

  Opposing Counsel: Donald H Clark, Esquire

WILLIAMS MULLEN
222 Central Park Avenue
Suite 1700
Virginia Beach, Virginia 23462
(757) 473-5338

- *Kiger v. Loving*, At Law No. 96-2009. I was lead counsel for a minority shareholder in a derivative action brought against majority shareholders of Max Media, Inc. The case was settled through a $12 million buyout of the minority shareholder's stock.

  a. Filed on 7/31/96; dismissed agreed on 3/14/97.

  b. Circuit Court of the City of Virginia Beach, Virginia - Judge Frederick B. Lowe

  c. Co-Counsel: Marshall B. Martin, Esquire
  WILLCOX & SAVAGE, P.C.
  1800 Bank of America Center
  Norfolk, Virginia 23510
  (757) 628-5605

  Opposing Counsel: Gregory N. Stillman, Esquire
  HUNTON & WILLIAMS
  SunTrust Center, Suite 1000
  Norfolk, Virginia 23514
  (757) 640-5314

- *Creditors Trust of Marine Hydraulics Int'l, Inc. v. Hong*, Civil Action No. 2:95cv941, (E.D. Va.). I was lead counsel for creditors of a bankrupt shipyard in an action against a former corporate officer and director for unlawful distribution of corporate funds, breach of fiduciary duty and violations of RICO. The case was settled after the Court denied defendant's Motion to Dismiss.

  a. Filed on 9/15/95; dismissed agreed on 11/15/96.

  b. U.S.D.C./E.D. Va., Norfolk Division - Magistrate Judge Tommy E. Miller

  c. Co-Counsel: Ross C. Reeves, Esquire
  WILLCOX & SAVAGE, P.C.
  1800 Bank of America Center
  Norfolk, Virginia 23510
  (757) 628-5545

  Opposing Counsel: Alan D. Albert, Esquire

TROUTMAN SANDERS LLP
150 W. Main Street
Suite 1600
Norfolk, Virginia 23510
(757) 687-7755

- *Superior Equipment Sales, Inc. Employee Stockownership Plan, et al. v. Sherman L. Reece,* Civil Action No. 2:03cv184 (E.D. Va.). I was lead counsel for the Employee Stock Ownership Plan ("ESOP") in this action involving securities fraud and ERISA claims arising from a leveraged buyout. The case was settled through a $1.8 million reduction in the purchase price.

  a. Filed on 3/5/03; dismissed agreed on 5/23/03.

  b. U.S.D.C./E.D. Va., Norfolk Division - Judge Jerome B. Friedman

  c. Co-Counsel: None

  Opposing Counsel: Robert C. Nusbaum, Esquire
  HOFHEIMER, NUSBAUM, P.C.
  999 Waterside Drive
  Suite 1700
  Norfolk, VA 23510
  (757) 629-0602

I also wrote the appellate briefs in the following decisions of significance:

United States v. Edge Broadcasting Co.,509 U.S. 418 (1993), reversing, 1992 WL 35795 (4th Cir. 1992). Conrad Shumadine (see above) and I represented Edge Broadcasting in seeking to have 18 U.S.C. § § 1304 & 1307 declared unconstitutional as applied. The District Court and Fourth Circuit ruled in favor of plaintiff. The United States Supreme Court reversed.

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048 (4th Cir. 1985). Guy R. Friddell, III (757/446-2660) and I represented Merrill Lynch in persuading the Fourth Circuit to hold, for the first time, that district courts have the power to grant preliminary injunctions to preserve the status quo pending mandatory arbitration.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. **List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.**

   Upon withdrawal from the partnership, Troutman Sanders LLP will redeem my capital account.

2. **Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.**

   There are no categories of litigation that will present a conflict of interest. As to financial arrangements, we will keep a list in chambers of the stocks that I own personally or own through an entity, such as a trust or limited liability company. I will not hear cases involving those companies.

   I currently have 401(k) plans administered by the two law firms for which I worked since 1982. I will transfer those accounts into a Rollover IRA so that I can hear cases in which Troutman Sanders LLP or Willcox & Savage, P.C. have made an appearance. I will, in all instances, follow the code of Judicial Conduct rules about conflicts of interest.

3. **Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.**

   I have agreed to teach an antitrust course in the Spring semester (2004) at Regent University School of Law. I am not committed to teach the course in future years.

4. **List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)**

   2002 Sources and Amounts of Income

   See Financial Disclosure Report

5. **Please complete the attached financial net worth statement in detail (Add schedules as called for).**

   See Attached

6. **Have you ever held a position or played role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.**

   I have volunteered my time and money to numerous campaigns, including Whitehurst for Congress ('68, '70 and '72), Allen for Governor ('93), Drake for Delegate ('95), Warner for Senate ('96), Gilmore for Governor ('97), Earley for Attorney General ('97),Graeber for Delegate ('97 and '99), Rerras for State Senate ('99), Allen for Senate ('00), Earley for Governor ('01), Mirman for Clerk of Court ('03) and Dix for Delegate ('03).

   The only campaigns in which I held a formal position are the two Graeber for Delegate campaigns. I was chair of the Finance Committee in each campaign.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT

Calendar Year 2002

Report Required by the Ethics in Government Act of 1978 (5 U.S.C. app. §§ 101-111)

1. Person Reporting (Last name, First name, Middle initial)	2. Court or Organization	3. Date of Report
Kelley, Walter D., Jr.	USDC - E.D. Va	10/29/2003
4. Title (Article III Judges indicate active or senior status; magistrate judges indicate full- or part-time)	5. ReportType (check appropriate type)	6. Reporting Period
U.S. District Judge-Nominee	(•) Nomination, Date 10/31/03 ( ) Initial ( ) Annual ( ) Final	1/1/2002 to 9/30/2003
7. Chambers or Office Address	8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
150 W. Main Street, Suite 1600 Norfolk, VA 23510	Reviewing Officer_____ Date_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. (Reporting individual only; see pp. 9-13 of filing instructions)

☐ NONE - (No reportable positions.)

	POSITION	NAME OF ORGANIZATION/ENTITY
1.	Partner	Troutman Sanders LLP
2.	General Partner	Limited Partnership #1
3.	Manager	LLC #1
4.	Manager	LLC #2
5.	Manager	LLC #3
6.	Trustee	Trust #1
7.	Trustee	Trust #2
8.	Trustee	Trust #3
9.	Trustee	Trust #4
10.	Trustee	Trust #5

II. AGREEMENTS. (Reporting individual only; see pp. 14-16 of filing instructions)

☐ NONE - (No reportable agreements.)

	DATE	PARTIES AND TERMS
1.	1982	Wilcox & Savage, P.C. 401(k) Plan, self directed (to be rolled over to independent plan)
2.	2001	Troutman Sanders LLP 401(k) Plan, no control (to be rolled over to independent plan)
3.	2003	Troutman Sanders LLP 401(a) Plan, no control (to be rolled over to independent plan)
4.	2001	Troutman Sanders LLP (return of partnership capital)

III. NON-INVESTMENT INCOME. (Reporting individual and spouse; see pp. 17-24 of filing instructions)

☐ **NONE** (No reportable non-investment income.)

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
1.	2001	Willcox & Savage, P.C. (salary)	$48,423.00
2.	2001 -03	Troutman Sanders LLP (Partnership distributions)	$710,515.72
3.	2003	Regent University (teaching)	1.00
4.	2002-03	Jennifer Kelley Designs (clothes sales/sole proprietor)	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Kelley, Walter D., Jr.	10/29/2003

V. REIMBURSEMENTS -- transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children. See pp. 25-27 of instructions.)

☐ NONE - (No such reportable reimbursements.)

	SOURCE	DESCRIPTION
1.	Exempt	

V. GIFTS. (Includes those to spouse and dependent children. See pp. 28-31 of instructions.)

☐ NONE - (No such reportable gifts.)

	SOURCE	DESCRIPTION	VALUE
1.	Exempt		

VI. LIABILITIES. (Includes those of spouse and dependent children. See pp. 32-34 of instructions.)

☐ NONE - (No reportable liabilities.)

	CREDITOR	DESCRIPTION	VALUE CODE
1.	Fidelity Investments	Margin Loan	K
2.	Capital One	Credit Card	J
3.	Merrill Lynch	Margin Loan	L
4.	American Expreess	Credit Card	J
5.	SouthTrust Bank	Personal Line of Credit	K

FINANCIAL DISCLOSURE REPORT
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Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

II. INVESTMENTS and TRUSTS – income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
NONE (No reportable income, assets, or transactions)									
LIMITED PARTNERSHIP #1									
-- First Industrial Realty Trust (REIT)	D	Dividend	L	T					
-- Allied Capital Corp. Common Stock	D	Dividend			Exempt				
-- Dominion Resources, Inc. Common Stock	D	Dividend	K	T					
-- Horizon Group PPTYS (REIT)	A	Dividend	J	T					
-- Mills Corp. Common Stock	B	Dividend	K	T					
-- Growth Fund of America	A	Dividend	J	T					
-- Note Receivable (from American Recovery Services, LLC))	A	Interest	L	U					
-- Note Receivable (KMK Factoring, LLC)	A	Interest	K	T					
10. LIMITED LIABILITY COMPANY #1									
11. -- SouthTrust Bank Account	A	Interest	J	T					
12. -- Accounts Receivable		None	M	U					
13. -- Note Receivable (William C. McKnew)	A	Interest	M	U					
14. LIMITED LIABILITY COMPANY #2									
15. -- SouthTrust Bank Account	A	Interest	J	T					
16. -- Note Receivable (American Recovery Services, LLC)	A	Interest	J	U					
17. LIMITED LIABILITY COMPANY #3									
18. -- SouthTrust Bank Account	A	Interest	J	T					

1. Income/Gain Codes: (See Columns B1 and D4) A = $1,000 or less; B = $1,001-$2,500; C = $2,501-$5,000; D = $5,001-$15,000; E = $15,001-$50,000; F = $50,001-$100,000; G = $100,001-$1,000,000; H1 = $1,000,001-$5,000,000; H2 = More than $5,000,000
2. Value Codes: (See Columns C1 and D3) J = $15,000 or less; K = $15,001-$50,000; L = $50,001-$100,000; M = $100,001-$250,000; N = $250,000-$500,000; O = $500,001-$1,000,000; P1 = $1,000,001-$5,000,000; P2 = $5,000,001-$25,000,000; P3 = $25,000,001-$50,000,000; P4 = More than $50,000,000
3. Value Method Codes (See Column C2): Q = Appraisal; R = Cost (Real Estate Only); S = Assessment; T = Cash Market; U = Book Value; V = Other; W = Estimated

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Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

II. INVESTMENTS and TRUSTS -- income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
-- Note Receivable (KMK Factoring, LLC)	A	Interest	J	T					
TRUST #1									
-- SouthTrust Bank Account		None	J	T					
-- Prudential Whole Life Policy	D	Dividend	M	T					
-- Mass Mutual Whole Life Policy	D	Dividend	M	T					
Merrill Lynch TRUST #2									
-- ML Cash Reserves	A	Interest	K	T					
-- GMAC Bond	B	Interest	K	T					
-- Ford Motor Bond	B	Interest	K	T					
-- Virginia Beach Development Authority Industrial Bond	B	Interest	J	T					
-- Virginia Beach Development Authority Health Care Bond	C	Interest	L	T					
-- Richmond Metropolitan Authority Expressway Bond	B	Interest	K	T					
-- Norfolk IDA Bond	B	Interest	K	T					
-- Metropolitan Washington, D.C. Airports Bond	A	Interest			Exempt				
-- Henrico Co. Municipal Bond	B	Interest	L	T					
-- Newport News Municipal Bond	C	Interest	L	T					
-- Virginia State Public Bldg. Bond	C	Interest	M	T					
-- Virginia Public School Authority Bond	B.	Interest	L	T					

Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash Market	
	U = Book Value	V = Other	W = Estimated		

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Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

VII. INVESTMENTS and TRUSTS – income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
17. -- VHDA Multi Family Housing Bond	B	Interest	K	T					
18. -- Fairfax County Public Improvement Bond	B	Interest	K	T					
19. -- Virginia State HDA Commonwealth Bond	D	Interest			Exempt				
20. -- Virginia State Public Building Authority Bond	B.	Interest	K	T					
21. -- Richmond Municipal Bond	C	Interest	M	T					
22. -- Virginia Port. Authority Bond	C	Interest	L	T					
23. -- AMB Prop Corp. (REIT)	B	Dividend	K	T					
24. -- Hospitality PPTY's Trust (REIT)	C	Dividend	K	T					
25. -- Pepco Holdings Inc. Common Stock	A	Dividend	K	T					
26. -- Pub. Svc. Enterprise Group Common Stock	B.	Dividend	K	T					
27. -- SouthTrust Corp. Common Stock	B	Dividend	L	T					
28. -- Amcap Bldr. Fund	C	Interest	L	T					
29. -- American High Income Municipal Fund	E	Interest	N	T					
30. -- American New Perspective Fund	A	Dividend			Exempt				
31. TRUST #3									
32. -- ML Cash Reserves	A	Interest	J	T					
33. -- Amcap World Growth Fund	C	Dividend	M	T					
34. -- American Euro Pacific Growth Fund	A	Dividend	L	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

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Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
5. -- American SmallCap Fund	A	Dividend	M	T					
6. -- American Fundamental Income Fund	B	Dividend	L	T					
7. -- American New Perspective Fund	C	Dividend	N	T					
8. TRUST #4									
9. -- Putnam Int'l Growth Fund	J	Dividend			Exempt				
0. -- Putnam Int'l New Opportunities Fund		None			Exempt				
1. -- Putnam Int'l Voyager Fund	A	Dividend			Exempt				
2. -- Putnam Growth Opps. Fund		None			Exempt				
3. -- Putnam Mid Cap Value Fund	A	Dividend	K	T					
4. -- Putnam Int'l Equity Fund		None	K	T					
5. -- Putnam Growth Opps. Fund		None	J	T					
6. -- Putnam Income Fund	A	Dividend	J	T					
7. -- Putnam Asia Pacific Fund		None			Exempt				
8. TRUST #5									
9. -- ML Cash Reserves	A	Interest	K	T					
0. -- Hanover Co. Water & Sewer Bonds	B	Interest	K	T					
1. -- VHDA/Commonwealth Mortgage Bond	D	Interest	M	T					
2. -- Fairfax Co. Bond	B	Interest	K	T					

1. Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
3. – Manassas Virginia Municipal Bond	D	Interest	M	T					
4. – Loudon Co. Virginia Sanitation & Sewer Bond	B	Interest	K	T					
5. – Virginia State Public School Authority Bond	D	Interest	M	T					
6. – VHDA/Commonwealth Mortgage Bond	B	Interest	K	T					
7. – VHDA Bond	C	Interest			Exempt				
8. – Fairfax Co. Economic Development Bond	C	Interest	L	T					
9. – American New Perspective Fund	A	Dividend			Exempt				
0. – Arlington County Public Improvement. Bond	C	Interest	K	T					
1. – American Capital Fund Income Bldr.	C	Interest	L	T					
2. – ML Basic Value Fund	A	Dividend	J	T					
3. – American Capital World Fund	A	Dividend			Exempt				
4. – American High Income Municipal Bond Fund	C	Dividend	L	T					
5. – Richmond, Virginia Public Improvement Bond	B	Interest			Exempt				
6. – Trigon Health Care Inc. Common Stock	A	Dividend			Exempt				
7. IRA #1									
8. – ML Cash Reserves	A	Interest	J	T					
9. – American Euro Pacific Growth Fund	A	Dividend	J	T					
0. – American Small Cap World Fund		None	J	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,008,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

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Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

VII. INVESTMENTS and TRUSTS -- income, value, transcations (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
1. -- Growth Fund of America	A	Dividend	J	T					
2. -- ML Focus Value Fund		None	J	T					
3. -- ML Basic Value Fund		None	J	T					
4. IRA #2									
5. -- ML Cash Reserves		None	J	T					
6. -- MLBasic Value Fund		None	J	T					
7. -- ML Eurofund		None	J	T					
8. -- ML Fundamental Growth Fund		None	J	T					
9. -- ML Int'l Equity Fund		None	J	T					
00. -- Mercury Small Cap Fund		None			Exempt				
01. -- ML Large Cap Core Fund		None	J	T					
02. -- ML Pacific Fund		None	J	T					
03. -- ML Small Cap Growth Fund		None	J	T					
04. -- ML Small Cap Value Fund		None	J	T					
05. -- ML Bond Fund High Income	A	Dividend	J	T					
06. -- ML Bond Fund Core Bond	A	Interest	J	T					
07. 401(k) #1									
08. -- AES Corp. Common Stock		None	L	T					

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000		
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000			
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000			
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000			
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000				
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash Market			
	U = Book Value	V = Other	W = Estimated				

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Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A-H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
09. – American Tower Sys. Common Stock		None	M	T					
10. – Cincinnati Bell, Inc. Common Stock		None	K	T					
11. – Clear Channel Communications Common Stock		None			Exempt				
12. – Commerce Group Inc. Common Stock	A	Dividend			Exempt				
13. – CNA Surety Common Stock	A	Dividend			Exempt				
14. – Crown Holdings Common Stock		None	K	T					
15. – Fairfax Financial Holdings Common Stock	A	Dividend	K	T					
16. – Gladstone Commercial Corporation Common Stock	A	Dividend	K	T					
17. – International Speedway Corp. Common Stock	A	Dividend			Exempt				
18. – IPC Holdings, Ltd. Common Stock	A	Dividend	K	T					
19. – Journal Register Company Common Stock		None	K	T					
20. – Lamar Advertising Common Stock		None			Exempt				
21. – MGI Pharma Inc. Common Stock		None	L	T					
22. – Markel Corporation Common Stock		None	K	T					
23. – Massey Energy Common Stock	A	Dividend	L	T					
24. – Mellon Financial Corp. Common Stock	B	Dividend			Exempt				
25. – Micros Systems Common Stock		None	L	T					
26. – Niagara Mohawk Power Company Common Stock		None			Exempt				

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000		
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000			
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000			
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000			
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000				
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market			
	U = Book Value	V = Other	W = Estimated				

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Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

PART II. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
27. -- NTELOS Common Stock		None			Exempt				
28. -- Penn-America Group Inc. Common Stock	A	Dividend			Exempt				
29. -- Pico Holdings Inc. Common Stock		None			Exempt				
30. -- PMA Capital Corp. Common Stock	A	Dividend	K	T					
31. -- Pioneer Natural Resources Co. Common Stock		None	K	T					
32. -- Precision Auto Care Inc. Common Stock		None	J	T					
33. -- Reptron Electronics Common Stock		None			Exempt				
34. -- Southtrust Corp.Common Stock	B	Dividend	L	T					
35. -- Trigon Health Care Inc. Common Stock		None			Exempt				
36. -- Viacom Inc. Common Stock		None			Exempt				
37. -- Waste Management, Inc. Common Stock	A	Dividend	K	T					
38. -- Wells Fargo Co. Common Stock	A	Dividend	K	T					
39. -- Cardinal Financial Convertible Preferred Stock	A	Dividend	J	T					
40. -- Fidelity Cash Reserves (fdrxx)	A	Interest	K	T					
41. -- Host Marriot Cv. Pfd. Stock	B	Dividend	K	T					
42. 401(k) #2									
43. -- Wachovia Money Mkt. Fund	A	Interest	K	T					
44. 401(k) #3									

Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000		
Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

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Name of Person Reporting	Date of Report
Kelley, Walter D., Jr.	10/29/2003

VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
45. – Vanguard Wellesley Income Fund	A	Dividend	J	T					
46. – Vanguard 500 Index Fund	A	Dividend	J	T					
47. – Vanguard Small-Cap Index Fund	A	Dividend	J	T					
48. 401(a)									
49. – Wachovia Money Mkt. Fund	A	Interest	J	T					
50. Brokerage #1									
51. – American Tower Corp. Common Stock		None	J	T					
52. – AES Corp. Common Stock		None			Exempt				
53. – Cincinnati Bell Common Stock		None	J	T					
54. – Commerce Group Inc. Common Stock	A	Dividend			Exempt				
55. – Crown Holdings, Inc. Common Stock		None	J	T					
56. – Markel Corp. Common Stock		None	J	T					
57. – Massey Energy Common Stock	A	Dividend	J	T					
58. – Mellon Financial Corp. Common Stock	A	Dividend			Exempt				
59. – Mercantile Bank Shares Corporation Common Stock	A	Dividend	J	T					
60. – MGI Pharma, Inc. Common Stock		None	J	T					
61. – Micros Systems, Inc. Common Stock		None	J	T					
62. – NTELOS Common Stock		None			Exempt				

1. Income/Gain Codes: (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000	
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000		
2. Value Codes: (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000		
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000		
	P3 = $25,000,001-$50,000,000		P4 = More than $50,000,000			
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market		
	U = Book Value	V = Other	W = Estimated			

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VII. INVESTMENTS and TRUSTS – income, value, transactions (includes those of the spouse and dependent children. See pp. 34-57 of filing instructions.)

A. Description of Assets (including trust assets) Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period (1) Amount Code 1 (A -H)	B. (2) Type (e.g. div. rent. or int.)	C. Gross value at end of reporting period (1) Value Code 2 (J-P)	C. (2) Value Method Code 3 (Q-W)	D. Transactions during reporting period (1) Type (e.g. buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code 2 (J-P)	(4) Gain Code 1 (A-H)	(5) Identity of buyer/seller (if private transaction)
163. -- Pan America Group Inc. Common Stock	A	Dividend			Exempt				
164. -- Pico Holdings Inc. Common Stock		None			Exempt				
165. -- Pioneer Natural Res. Common Stock		None	J	T					
166. -- PMA Capital Common Stock	A	Dividend	J	T					
167. -- Waste Management Common Stock	A	Dividend	J	T					
168. -- The Phoenix Companies, Inc. Common Stock	A	Dividend	J	T					

1. Income/Gain Codes (See Columns B1 and D4)	A = $1,000 or less	B = $1,001-$2,500	C = $2,501-$5,000	D = $5,001-$15,000	E = $15,001-$50,000
	F = $50,001-$100,000	G = $100,001-$1,000,000	H1 = $1,000,001-$5,000,000	H2 = More than $5,000,000	
2. Value Codes (See Columns C1 and D3)	J = $15,000 or less	K = $15,001-$50,000	L = $50,001-$100,000	M = $100,001-$250,000	
	N = $250,000-$500,000	O = $500,001-$1,000,000	P1 = $1,000,001-$5,000,000	P2 = $5,000,001-$25,000,000	
	P3 = $25,000,001-$50,000,000		P4 = $More than $50,000,000		
3. Value Method Codes (See Column C2)	Q = Appraisal	R = Cost (Real Estate Only)	S = Assessment	T = Cash/Market	
	U = Book Value	V = Other	W = Estimated		

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Kelley, Walter D., Jr.	10/29/2003

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Kelley, Walter D., Jr.	10/29/2003

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature Walter D. Kelley, Jr. Date 10/29/03

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)

FILING INSTRUCTIONS

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		12	800	Notes payable to banks-secured		32	000
U.S. Government securities-add schedule			0	Notes payable to banks-unsecured		20	136
Listed securities-add schedule	1	721	700	Notes payable to relatives		85	000
Unlisted securities--add schedule		84	573	Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		5	000
Due from relatives and friends				Unpaid income tax (1/15/04 estimated)		40	000
Due from others (TS-Year End)		58	622	Other unpaid income and interest			0
Doubtful (KMK Factoring)		120	492	Real estate mortgages payable-add schedule		588	345
Real estate owned-add schedule		802	000	Chattel mortgages and other liens payable			0
Real estate mortgages receivable			0	Other debts-itemize:			
Autos and other personal property		52	000	Margin Loans		64	504
Cash value-life insurance		74	683				
Other assets itemize:							
Antiques/Art/Collectibles		75	000				
Jewelry/Furs		40	144				
Expense Reimbursements (TS)		11	500	Total liabilities		834	985
				Net Worth	2	218	529
Total Assets	3	053	514	Total liabilities and net worth	3	053	514
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor			0	Are any assets pledged? (Add schedule)	No		
On leases or contracts			0	Are you defendant in any suits or legal actions?	No		
Legal Claims			0	Have you ever taken bankruptcy?	No		
Provision for Federal Income Tax			0				
Other special debt			0				

SCHEDULE 1

LISTED SECURITIES

		Value
1.	Fidelity Account No. 613-758183 (WDK only) (401k)	$1,171,000
	AES Corp. Common Stock American Tower Sys. Common Stock Cincinnati Bell, Inc. Common Stock Crown Holdings Common Stock Fairfax Financial Holdings Common Stock Gladstone Commercial Corporation Common Stock IPC Holdings, Ltd. Common Stock Journal Register Company Common Stock MGI Pharma Inc. Common Stock Markel Corporation Common Stock Massey Energy Common Stock Micros Systems Common Stock PMA Capital Corp. Common Stock Pioneer Natural Resources Co. Common Stock Precision Auto Care Inc. Common Stock Southtrust Corp. Common Stock Waste Management, Inc. Common Stock Wells Fargo Co. Common Stock Cardinal Financial Convertible Preferred Stock Fidelity Cash Reserves (fdrxx) Host Marriott Cv. Pfd. Stock	
2.	Merrill Lynch Account No. 75511N36 (WDK only – 1/3 interest)	$800,061.75
	Putnam Int'l Growth Fund Putnam Int'l New Opportunities Fund Putnam Int'l Voyager Fund Putnam Growth Opps. Fund Putnam Mid Cap Value Fund Putnam Int'l Equity Fund Putnam Growth Opps. Fund Putnam Income Fund Putnam Asia Pacific Fund	

3.	Merrill Lynch Account No. 85A-22009 (children only) ML Cash Reserves Amcap World Growth Fund American Euro Pacific Growth Fund American Small Cap Fund American Fundamental Income Fund American New Perspective Fund	$95,830.00
4.	Merrill Lynch Account No. 85A-24589 (Joint) American Tower Corp. Common Stock Cincinnati Bell Common Stock Crown Holdings, Inc. Common Stock Markel Corp. Common Stock Massey Energy Common Stock Mercantile Bank Shares Corporation Common Stock MGI Pharma, Inc. Common Stock Micros Systems, Inc. Common Stock Pioneer Natural Res. Common Stock PMA Capital Common Stock Waste Management Common Stock The Phoenix Companies, Inc. Common Stock	$70,343.00
5.	Merrill Lynch Account No. 85A-82274 (JJK only) (Roth IRA) ML Cash Reserves ML Basic Value Fund ML Eurofund ML Fundamental Growth Fund ML Int'l Equity Fund ML Large Cap Core Fund ML Pacific Fund ML Small Cap Growth Fund ML Small Cap Value Fund ML Bond Fund High Income ML Bond Fund Core Bond	$8,876.00
6.	Merrill Lynch Account No. 85A-81U68 (WDK only) (Roth IRA) ML Cash Reserves American Euro Pacific Growth Fund	$45,721.00

	American Small Cap World Fund Growth Fund of America ML Focus Value Fund ML Basic Value Fund	
7.	Vanguard Plan No. (JJK only) (401k)	$24,800.00
	Vanguard Wellesley Income Fund Vanguard 500 Index Fund Vanguard Small Cap Index Fund	
8.	Wachovia Securities (TS Cash or Deferred Profit Sharing Plan) (WDK only) (401k)	$21,846.00
	Money Market Fund	
9.	Wachovia Securities (TS Aggregate Account) (WDK only) (401a)	$15,463.00
	Money Market Fund	
10.	Scott & Stringfellow Account No. 26251727 (Diversified Investments, L.P.) (WDK owns 0.5%)	$226,963.60
	First Industrial Realty Trust (REIT) Dominion Resources, Inc. Common Stock Horizon Group PPTYS (REIT) Mills Corp. Common Stock Growth Fund of America Notes Receivable	
	WDK/JJK/Children Total	**$1,721,700**

SCHEDULE 2

UNLISTED SECURITIES

		Value
1.	Troutman Sanders LLP (WDK only)	$47,000.00
2.	Note Purchase Co. LC (WDK only)	$10,000.00
3.	KMK Factoring, LLC (Joint)	$1.00
4.	Kelley Family Investments, L.P. (WDK only-1% ownership)	$7,219.00
5.	Time Share Royal Islander Resort Cancun, Mexico (Joint)	$27,500.00
	WDK/JJK TOTAL	**$84,573.00**

SCHEDULE 3

REAL ESTATE OWNED

		Value
1.	1702 Cloncurry Road Norfolk, VA (WDK only)	$750,000.00
2.	Rt. 13 and Rogers Lane Nassawadox, VA (JJK only – ½ interest)	$52,000.00

SCHEDULE 4

REAL ESTATE MORTGAGES

		Debt
1.	1702 Cloncurry Road Norfolk, VA First Mortgage Payable to Merrill Lynch	$446,000.00
2.	1702 Cloncurry Road Norfolk, VA Second Mortgage Payable to SunTrust Bank	$142,345.27

III. GENERAL (PUBLIC)

1. **An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.**

Rather than litigating specific pro bono cases, I have worked in broader civic organizations that improve the public good. These include:

- Attorney General's Task Force on Higher Education (2003 to Present)
  (1 day a month for six months)
- Rector (2000 to 2002) and Member (2000 to present)
  Old Dominion University Board of Visitors
  (5-10 hours a week when Rector; 2 days a month for Board)
- Board of Directors, Norfolk Botanical Garden Foundation (1999 to present)
  (minimal time)
- Chairman (1994 to 1998) and Director (1991 to present)
  Hampton Roads Board of The Salvation Army Adult Rehabilitation Center
  (5-10 hours a week when Chairman; 1 day a month for Board)
- Trustee (1990 to 2003)
  Norfolk Collegiate School
  (1 day a month)

2. **The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?**

No.

3. **Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to you nomination and interviews in which you participated).**

There is no formal selection commission for judgeships on the United States District Court for the Eastern District of Virginia. However, Senators Warner and Allen solicit input from various Bar organizations as part of the process.

By letter dated May 29, 2003, the Virginia Bar Association advised the Senators that it would "particularly support" my candidacy. A copy of this letter is included as part of Exhibit 1.

By letter dated June 3, 2003, the Virginia Association of Defense Attorneys ("VADA") endorsed my candidacy. A copy of this letter is included as part of Exhibit 1.

By letter dated June 4, 2003, the Virginia State Bar recommended me to the Senators as one of "four candidates best qualified at this time from among the candidates considered." A copy of this letter is included as part of Exhibit 1.

By letter dated June 6, 2003, the Norfolk & Portsmouth Bar Association advised Senators Warner and Allen that I was the only candidate for the judgeship "found to be highly qualified by the [Selection] Committee and by the voting members of the Association." A copy of this letter is included as part of Exhibit 1.

Finally, by letter dated June 11, 2003, the Virginia Women Attorneys Association found me to be "qualified" for the judgeship. A copy of this letter is included as part of Exhibit 1.

Once the Bar organizations provided their input, Senators Warner and Allen jointly interviewed the candidates. My interview took place on July 22, 2003 in Senator Warner's office. It lasted approximately one hour.

By letter dated July 30, 2003, Senators Warner and Allen recommended me and two other candidates to the President for his consideration. (Exhibit 1). I subsequently was interviewed on August 12, 2003 by representatives of the Justice Department and Office of Counsel to the President.

4. **Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.**

No.

5. **Please discuss your views on the following criticism involving "judicial activism."**

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels

of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. The tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The United States Constitution allocates governmental power both horizontally and vertically. On the horizontal level, it is the province of Congress to pass laws on subjects reserved to it by the Constitution. Vertically, the state legislatures are responsible for passing laws that address those areas not expressly delegated to Congress. In both cases, the Judiciary is obligated to honor those laws by applying them to the facts of a particular case. Only in the most unusual of cases is the Judiciary empowered to overrule the judgment of Congress or a state legislature by declaring a particular law unconstitutional.

The deference that the judiciary must pay to the legislative prerogative requires a threshold examination of a plaintiff's standing, whether his or her claim is ripe and whether a true case or controversy exists. The role of the Judiciary is to resolve specific disputes; it is not to lay down broad rules of societal conduct. The failure to apply strict threshold tests of standing, ripeness and justiciability is tantamount to legislating rather than judging.

The proper remedy to apply in a particular case is another area in which the Judiciary must exercise its power with great care. The law recognizes that injunctive remedies must sometimes be broader than the underlying offense in order to make the parties whole. However, the zeal to right a wrong cannot override the Legislature's prerogatives. The short-term result may be "just," but the long-run result is a loss of respect for the allocations of power within our system of government.

Senator CORNYN. Thank you.

Judge Cooke, we would be glad to hear your opening.

STATEMENT OF MARCIA G. COOKE, NOMINEE TO BE DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF FLORIDA

Judge COOKE. Good afternoon. I do not have an opening, but I would of course like to thank President Bush for the nomination, the cooperation of my two State Senators, Senators Nelson and Graham, and to introduce my friends who managed to make it here from Florida today, Cynthia Johnson-Stacks; Cynthia Everett; my colleague from the Georgetown University Board of Directors, Jack Cassidy; Karl Pilger, a fellow teacher of mine with the National Institute of Trial Advocacy; my college roommate, who proves that I still have long-serving friends, Gwendolyn Baylor and her daughter Samantha.

Senator CORNYN. Welcome to all of you. Thank you for being here today.

[The biographical information of Judge Cooke follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

   Marcia Gail Cooke

2. Address: List current place of residence and office address(es).

   Office:

   County Attorney's Office
   Miami-Dade County
   111 N.W. 1st Street, Suite 2810
   Miami, FL 33129

   Residence:

   Bay Harbor Islands, Florida

3. Date and place of birth.

   October 16, 1954
   Sumter, South Carolina

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address (es).

   Divorced

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

   Wayne State University Law School
   Juris Doctor (J.D.), 1977
   1975 to 1978

   Georgetown University
   Bachelor of Science in Foreign Service (BSFS), 1975
   1971 to 1975

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

July 2002 – present

Assistant County Attorney
Miami-Dade County
111 N.W. 1st Street, Suite 2810
Miami, FL 33128

January 2003—present

Board of Directors/Secretary
Miami Federal Credit Union
51 SW 1st Avenue
Miami, Florida 33131

January 1999—March 2002

Chief Inspector General
Executive Office of the Governor
Tallahassee, Florida
Rm. 2103, The Capitol
Tallahassee, Florida 32399

January 1994—January 1999

Assistant United States Attorney
Director of Professional Development & Training
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street
Miami, Florida 33132

October 1996 – May 1997

Acting Administrative Officer
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street
Miami, Florida 33132

October 1996—October 1998

President
Georgetown University
Alumni Association
Board Of Governors
Georgetown University
Healy Building
37th & O Street NW
Washington, DC 20057

October 1996—present

Board of Directors
Georgetown University
Healy Building
37th & O Street NW
Washington, DC 20057

January 1995—January 1999

Board of Directors
Miami Federal Credit Union
51 SW 1st Avenue
Miami, Florida 33131

October 1992 – January 1994

Executive Assistant United States Attorney
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street
Miami, Florida 33132

August 1992—October 1992

Director of Professional Development & Training
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street
Miami, Florida 33132

March 1984 – August 1992

United States Magistrate Judge
Eastern District of Michigan
231 W. Lafayette Blvd.
Detroit, Michigan 48226

September 1983 – March 1984

Associate
Miro, Miro & Weiner
550 N. Woodward Avenue
Bloomfield Hills, Michigan 48013

September 1980 –September 1983

Assistant United States Attorney
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, Michigan 48226

September 1979 to September 1980

Deputy Public Defender
Legal Aid and Defender Association
645 Griswold Street
Detroit, Michigan 48226

May 1978 to September 1979

Staff Attorney
Neighborhood Legal Services
104 Lothrop Landing
Detroit, Michigan 48226

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

No

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

Undergraduate Awards

Dean's Office Award

This award is given to a graduating senior who has demonstrated a significant level of service to the School of Foreign Service Community. The Dean of the School of Foreign Service selects the recipient of the award.

Black Students Association Achievement Award

The Black Student Association selects a student who exemplifies academic and community service achievements.

Law School Awards and Honors

National Moot Court Team
(Full Scholarship awarded)

Members of the National Moot Court Team are selected from the members of the second-year class who demonstrated strong appellate (brief writing and advocacy) skills. The recipients are chosen from the semi-finalist and finalist teams in the law school-wide Moot Court Competition. Recipients receive a full tuition scholarship and comprise the membership of the National Moot Court Team for the following year.

Phillip Jessup International Moot Court Competition
(Regional Finalist)

The Philip C. Jessup International Law Moot Court Competition was founded in the spring of 1959. The Jessup Competition has risen to the preeminent position of being the largest and most prestigious international law moot court competition in the world. Participants first compete in regional competitions.

Law students around the world spend an entire year preparing to compete in the Jessup competition by auditioning and selecting team members, researching the topic, developing oral and written advocacy skills. A fraternity of legal professionals has evolved and, each spring, a phenomenal event occurs when new and former participants converge to build bonds and to share in an invaluable cultural and academic exchange in a moot court competition. I was a member of the team for Wayne State University in 1977. The finals were held in San Francisco.

Barristers' Award

The Order of the Barristers is a national organization that honors law students exhibiting outstanding oral advocacy and brief writing skills.

Black Law Student Associations Certificate of Merit

The Certificate of Merit is given to a member of the Association who has demonstrated service to the organization, the profession, and the community.

Others

Director's Award, 1982-1983, Executive Office of United States Attorneys, United States Department of Justice

The Director's Award is given yearly to recognize outstanding work of Assistant United States Attorneys.

Woman of the Year
(Zeta Phi Beta Sorority)

This award is given by one of the largest African -American sororities. The sorority is recognized for its community-based programs, including scholarships and mentoring. Each year the sorority selects a woman who exemplifies the professional and personal standards of the sorority.

Presidential Citation
(Georgetown University Alumni Association)

The President of the Georgetown University Alumni Association gives this award. The award recognizes service to the Alumni Association and the University Community. This award was received in 1995.

John Carroll Award
(Georgetown University)

The John Carroll Award was established in 1951. It is the highest honor the University confers on an alumnus. The award is given to a graduate whose achievements exemplify the ideals and tradition of Georgetown University and its founder, John Carroll. Past recipients include Honorable Lyndon B. Johnson, President of the United States; Honorable John J. Sirica, United States District Judge; Charles M. Cawley, President and Founder MBNA Bank; and Honorable John D. Dingell, United States Representative. I was given the award in 2000.

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

I am a member of the Michigan and Florida Bar Associations. I am a life member of the Michigan Bar Foundation. I am also a member of the National Bar Association and the National Bar Association-Women Lawyers Division-Dade County Chapter and a member of the Wilkie D. Ferguson, Jr. Bar Association.

While an attorney and Magistrate Judge in Detroit, I was active in the Federal Bar Association. Although I served on a variety of different committees in different capacities, I do not recall the specifics of the service.

I am a member of the National Institute of Trial Lawyers (NITA). I teach at various trial practice programs.

I served on the Magistrate Selection/Review Panel of the Southern District of Florida in 1993-1994.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not belong to organizations, other than bar associations, that may be active in lobbying before public bodies.

I am active in a number of activities at Georgetown University on a national and a local level.

I serve on the Board of Directors of Georgetown University. I am a member of the Alumni Board of Governors and the African-American Alumni Advisory Board. I served as the president of the Georgetown University Alumni Association from 1996 to1998. I have served on various committees of the University, including the Alumni Admissions Program and the search committee for Vice President of the Alumni Association. I am also active in the Georgetown University Club of Miami.

I am a member of the Board of Directors of the Miami Federal Credit Union. I serve on the Executive Committee and hold the position of Secretary. I initially served on the Board from 1995-1999. I did not hold a leadership position. I was selected to serve on the Board again in January 2003. I became the Secretary at that time.

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Court or Administrative Body	Date of Admission
Florida:	
Florida Supreme Court	April 2001
United States District Court Southern District of Florida	November 2002
United States District Court Northern District of Florida	December 2002
Michigan:	
Michigan Supreme Court	May 1978
United States District Court Eastern District of Michigan	May, 1978
United States Court of Appeals for the Sixth Circuit	Spring, 1983

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Journal Articles

Sixth Annual Survey of Sixth Circuit
Law—Criminal Procedure
1985 Det. C. L. Rev 473
(copy attached)

Reports

1. Public Corruption Study Commission
   December 1999
   (copy attached)

2. Federal and State Immigration Law Enforcement Symposium
   Spring 1996
   (copy attached)

While I was a United States Magistrate, I did occasionally speak at training programs for law enforcement agents and attorneys on issues related to practice before United States Magistrate Judges. I did not retain copies of the presentations and I no longer recall the dates of the presentations. I have not served as a United States Magistrate Judge since August 1992.

I have taught at various trial practice programs and continuing legal education seminars on issues related to trial techniques and trial practice during my twenty-five year legal career. I do not have a record of every one of these programs. I have not retained outlines or copies of these presentations. However, by way of example, I have taught at the National Institute of Trial Advocacy Northeast Regional held at Hofstra University every August since 1987; the Benjamin Cardozo School of Law Intensive Trial Advocacy Program, held in January since 1988; Widener University Law School Intensive Trial Advocacy Program, May 1989 (approximately) until May 1994 (approximately). The press did not cover these seminars.

13. Health: What is the present state of your health? List the date of your last physical examination.

Excellent. October 6, 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

Yes, I have held judicial office. I served as a United States Magistrate Judge in the Eastern District of Michigan from March 1984 until August 1992. I performed the full range of duties allowed under federal statutes.

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together

with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Ten Significant Opinions:

1. TWM Manufacturing Company, Inc. v. Dura Corporation
   Civ. No. 74-72852-Gilmore
   Magistrate Report and Recommendation on Computation of Damages

2. Edmond v. Koselka
   Civ. No. 82-74309-DT-Pratt
   Magistrate Report and Recommendation

3. United States v. Kelley
   86-CR-80329-DT-Woods
   Magistrate Report and Recommendation

4. McIntosh v. Grinage
   87-CV-72176- DT-Gilmore
   Magistrate Report and Recommendation

5. Pitts v. Michael Miller Car Rental
   87-CV-72532-DT-Woods

6. Color Custom Compounding, Inc., v. United Technologies
   88-CV-74478- DT-Rosen
   Magistrate Report and Recommendation Re: Defendants' Motion for Summary Judgment on the Grounds of License, Estopple and Laches

7. Color Custom Compounding, Inc., v. United Technologies
   88-CV-74478 – DT-Rosen
   Magistrate Report and Recommendation Re: Defendant's (Indian Head) Motion for Summary Judgment on the Basis of Best Mode

8. Curtis Processing Company v. CM&E/California, Inc
   90-CV-70026-Hackett
   Magistrate Report and Recommendation

9. Comshare, INC., v. United States of America
   90-CV-71136 - DT-Hackett
   Magistrate Report and Recommendation (Corrected)

10. Farmers Insurance Exchange v. Riverside International, INC.
    91-CV-72155-DT-Hackett
    Magistrate Report and Recommendation

2. Decisions Reversed or Criticized

Serving as a United States Magistrate Judge, I authored many reports and recommendations. The assigned District Judge did not always accept the report and recommendation. The non-acceptance of a report and recommendation is not always reported. The cases noted below have been reported:

1. Larson v. Secretary of Health and Human Services, 780 F.2d 1022 (6th Cir. 1985), unpublished.

   Ronald Larson sought review of the Secretary's denial of his application for disability benefits in a complaint filed in the United States District Court for the Eastern District of Michigan. I was referred the matter. I recommended a reversal of the Secretary's decision, reasoning that there was not substantial evidence to support the findings of the Administrative Law Judge (ALJ). I opined that the ALJ "totally ignored" certain evidence and failed to point to any medical evidence to support his conclusion that Mr. Larson possessed the residual functional capacity to perform sedentary work. The Secretary filed objections to the report and recommendation. The District Judge thereafter rejected my report and recommendation, granted the Secretary's motion for summary judgment and dismissed Mr. Larson's complaint. The district court concluded that there was substantial evidence to support the findings of the Secretary. The appellate court agreed with the district court's rejection of the report and recommendation. The court found that the administrative record as a whole supported the determination of the Secretary that Mr. Larson did not have an impairment that indicated he was totally disabled.

2. United States v. Leibowitz, 652 F. Supp. 991 (N.D. Ind. 1987)

   The defendant who was charged initially in a criminal complaint with interfering with a grand jury and murder for hire, brought a motion to determine whether he was entitled to release pending trial. The defendant had been arrested on a warrant and appeared before me for an initial appearance. The government moved for detention, pursuant to the Bail Reform Act, Section 3141, *et seq*, of Title 18 United States Code. Following the detention hearing, I set a $75,000 cash bond, but I granted the government's request for a stay of the release order. The Honorable Robert L. Miller, Jr., United States District Judge for the Northern District of Indiana, conducted a hearing to review the release order. Judge Miller found that the government

had proved by clear and convincing evidence that the release of the defendant under a condition or combination of conditions would endanger the safety of another person or the community. The defendant was ordered detained, reversing my order allowing the defendant to post bond. The defendant filed an appeal on the same day that a Grand Jury in the Northern District of Indiana returned an indictment charging the defendant in 23 separate counts. The government maintained that a separate determination on the defendant's eligibility for pretrial release was unnecessary because the defendant had been ordered detained "prior to trial" in the initial order of the detention. The Honorable Allen Sharp, Chief Judge for the United States District Court for the Northern District of Indiana, conducted a "distinct detention hearing" based on the indictment in the "interest of providing the most comprehensive protection of the defendant's due process rights". Judge Sharp in his opinion, without criticizing my initial release order, ordered the defendant detained.

3. Jordan v. Secretary of Health and Human Services, 845 F.2d 326 (6th Cir. 1988) (unpublished, per curiam)

The plaintiff, who had applied for social security disability benefits, appealed the district court's grant of summary judgment in favor of the Secretary. On review, in a *per curiam* unpublished decision, the appellate court accepted the findings in my report and recommendation which awarded benefits, concluded that there was not substantial evidence supporting the Secretary's decision to deny the plaintiff benefits and reversed the district court's decision. The matter was remanded to the district court to instruct the Secretary to order the full payment of benefits to the plaintiff.

4. Melkus v. Sullivan, 849 F.2d. 1473 (6th Cir. 1988), (unpublished, per curiam)

The plaintiff sought review of the Secretary's denial of his application for disability benefits in a complaint filed in the United States District Court for the Eastern District of Michigan. I was referred the matter on cross-motions for summary judgment, I concluded that the plaintiff was entitled to benefits on his second application. However, I agreed with the Administrative Law Judge that the plaintiff had failed to establish good cause for an untimely request for reconsideration of the first application. The plaintiff filed exceptions to the latter portion of my report and recommendation, and the Secretary filed no exceptions. However, upon examination of the record, the district court disagreed with me on the merits of the second application and found that the ALJ's decision was supported by substantial evidence.

The plaintiff appealed the district court's grant of summary judgment in favor of the Secretary. The appellate court agreed with my report and recommendation that the plaintiff/appellant was not capable of sedentary work and reversed the judgment of the district court. The case was remanded to the Secretary for determination of the benefits to which the plaintiff is entitled.

5. Melkus v. Sullivan, 902 F.2d. 33 (6th Cir. 1990), (unpublished, per curiam)

The plaintiff filed his first application for disability benefits in 1979, alleging an onset date of December 21, 1978. The Secretary denied this application initially. Five years later, plaintiff again filed for benefits and a belated "Request for Reconsideration" of the 1979 denial. The agency denied the request for reconsideration on the basis that the plaintiff had not shown good cause for the delay. The plaintiff then sought a request for a hearing. However, an Administrative Law Judge dismissed the request holding that any such request for a hearing could not occur until after the reconsideration by the agency. The plaintiff did not seek review of this decision. Meanwhile, the second application was denied both initially and on reconsideration. An Administrative Law Judge found that pursuant to the second application the plaintiff was not disabled. In addition, the Administrative Law Judge found that there was no good cause for the delay in the filing for reconsideration of the first application. Plaintiff sought judicial review in the United States District Court for the Eastern District of Michigan of the final decision of the Secretary of Health and Human Services denying the Plaintiff's request for social security disability benefits. The matter was referred to me for a report and recommendation. I issued a report and recommendation to award benefits based on the plaintiff's second application for disability benefits. I did not discuss the issue of the first application or good cause for the delay in requesting reconsideration. The district court ruled against my recommendation, reasoning that the plaintiff was capable of sedentary work and was not disabled. The district court also noted that there was not good cause for the delay in filing the request for reconsideration of the first application.

On appeal, the Sixth Circuit reversed, holding that substantial evidence did not support the conclusion that the plaintiff was not disabled. Melkus v. Secretary of Health and Human Services, 849 F.2d 1473 (6th Cir. 1988, unpublished per curiam) ("Melkus I"). Upon reversal, the appellate court remanded the case "with directions that it be further remanded to the Secretary for determination of the benefits to which the plaintiff is entitled." Thereafter the district court issued an

order remanding the case to the Secretary for determination of benefits. The Office of Disability Operations made its determination of the benefits to which the plaintiff was entitled. The plaintiff contends that the Secretary was limited to making a determination of the amount of benefits and could not reconsider the issue of substantive entitlement of the first application. The district court ruled "that defendant Secretary's determination that plaintiff is entitled to retroactive benefits based only on his second application is not contrary to the Sixth Circuit's mandate of this court's order of remand." The plaintiff appealed, arguing that the district court failed to follow the mandate of *Melkus I* and urged the appellate court to order the Secretary to award benefits on his first application. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court.

6. Gibson v. Sec. of HHS, Unempl. Ins. Rep (CCH) para. 15935A (E.D. Mich. 1990)

The plaintiff sought judicial review in the United States District Court for the Eastern District of Michigan of the final decision of the Secretary of Health and Human Services denying the plaintiff's request for social security disability benefits. In the district court, the parties filed cross-motions for summary judgment. The matter was referred to me for a report and recommendation. In my report and recommendation, I recommended that the court grant the defendant's motion for summary judgment because substantial evidence supported the Administrative Law Judge's conclusion that the plaintiff was still able to perform his past work as a special education instructor. The district judge concluded that the ALJ's finding that the plaintiff was unable to resume his prior work was not supported by substantial evidence. The court found that I had not given the substantial deference to the plaintiff's treating physician as the law of the Circuit required. The Court found that the treating physician had set forth in detail the objective clinical data upon which he had based his conclusion that the plaintiff was unable to return to his work as a teacher. Although the treating physician concluded that the plaintiff was 'permanently disabled" from his work as a teacher, the physician did not provide sufficient information to determine if the plaintiff was capable of retraining. The case was remanded to the Secretary with instructions to "determine whether the Plaintiff [could] perform other work that exist[ed] in substantial numbers in the national economy."

7. Cohen v. Secretary of Department of Health and Human Services, 964 F. 2d 524 (6th Cir. 1992)

The plaintiff filed in action in the United States District Court for the Eastern District of Michigan for review of a final decision of the Secretary of Health and Human Services denying her application for disability insurance benefits. The district court referred the matter to me for a report and recommendation. Thereafter, the parties filed cross motions for summary judgment. I issued a report and recommendation concluding that the Secretary's denial of benefits was not supported by substantial evidence and recommended that summary judgment be granted in plaintiff's favor. I was convinced, based upon the medical reports and the plaintiff's testimony regarding her symptoms, that the plaintiff was clearly disabled as a result of the Epstein-Barr virus and chronic fatigue syndrome. The secretary filed an objection to the report and recommendation. The district court reviewed the case and rejected my report and recommendation. The appellate court specifically found that the district court erred in rejecting my recommendation. The appellate court found that the appellant was disabled by chronic fatigue syndrome despite her ability to attend law school for six credit hours per semester and engage in otter activities.

3. **Citations for significant opinions on federal or state constitutional issues**

None

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

I held the position of Chief Inspector General—State of Florida from January 1999 until March 2002. It is a gubernatorial appointment.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I never served as a clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have never practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

July 2002 – present

Assistant County Attorney
Miami-Dade County
111 N.W. 1st Street, Suite 2810
Miami, FL 33128
(305) 375-5151

January 1999—March 2002

Chief Inspector General
Executive Office of the Governor
Rm. 2103,
The Capitol
Tallahassee, Florida 32399
(850) 922-4637

January 1994—January 1999

Assistant United States Attorney
Director of Professional Development & Training
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9001

October 1996 -- May 1997

Acting Administrative Officer
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street
Miami, Florida 33132
305) 961-9001

October 1992 – January 1994

Executive Assistant United States Attorney
United States Attorney's Office
Southern District of Florida
99 N.E. 4th Street
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(305) 961-9001

August 1992—October 1992

Director of Professional Development & Training
United States Attorney's Office
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March 1984 – August 1992

United States Magistrate Judge
Eastern District of Michigan
231 W. Lafayette Blvd.
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September 1983 – March 1984

Associate
Miro, Miro & Weiner
550 N. Woodward Avenue
Bloomfield Hills, Michigan 48013
(248) 646-2400

September 1980 –September 1983

Assistant United States Attorney
Eastern District of Michigan
211 West Fort Street, Suite 2001
Detroit, Michigan 48226
226-9100

September 1979 to September 1980

Deputy Public Defender
Legal Aid and Defender Association
645 Griswold Street
Detroit, Michigan 48226
313) 961-4111

May 1978 to September 1979

Staff Attorney
Neighborhood Legal Services
104 Lothrop Landing
Detroit, Michigan 48226
(313) 874-5824

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

From 1978-1980, I represented individuals unable to afford counsel. As a staff attorney for a legal services organization, I represented individuals in civil matters. As a public defender, I represented individuals in criminal matters.

Since 1980, I have practiced almost exclusively in two federal district courts, the Eastern District of Michigan and the Southern District of Florida. From 1980-1983, I served as an

Assistant United States Attorney (AUSA). I acted primarily as a criminal prosecutor in the United States District Court for the Eastern District of Michigan. During this period I also occasionally appeared in the United States Court of Appeals for the Sixth Circuit.

In 1984, I became a United States Magistrate Judge for the Eastern District of Michigan. During the eight-year period, 1984—1992, I performed the full range of civil and criminal duties of a United States Magistrate Judge.

I joined the United States Attorney's Office for the Southern District of Florida in 1992. As the Director for Professional Development and Training and as an Executive Assistant United States Attorney, I performed a variety of administrative duties and litigation functions and tasks. I also appeared in the United States Court of Appeals for the Eleventh Circuit.

In 1999, I joined the Executive Office of the Governor for the State of Florida as the Chief Inspector General. In that capacity, I served as the inspector general for the Executive Office of the Governor and the "supervisory liaison" with all the inspector generals of the fourteen agencies under the jurisdiction of the Governor. I handled matters related to accountability, integrity, and efficiency within the fourteen agencies. I served as Chief Inspector General until March 2002.

I presently serve as an Assistant County Attorney for Miami-Dade County. I handle only civil matters. I provide legal counsel and assistance to the Miami-Dade Board of County Commissioners and various departments and agencies of Miami-Dade County. I litigate in state and federal court and administrative proceedings on behalf of Miami-Dade County, primarily in a defensive posture, including but not limited to personal injury, civil rights and employment matters. I draft and review contracts, Requests for Proposals (RFP) and Requests for Qualifications (RFQ) on behalf of various county departments and agencies. I also serve as the HIPAA (Health Insurance Portability and Accountability Act) and privacy legal liaison to Miami-Dade County agencies.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

As a legal services attorney and as a public defender, the typical clients I represented were individuals unable to afford counsel. In the legal services area, I handled civil matters. As a public defender, I handled criminal matters.

As a United States Magistrate Judge, I did not have clients. I was a federal judicial officer charged with the duty to be the "neutral and detached" arbiter of law and or facts in a case or controversy before the court. I handled a full range of criminal and civil cases.

As an Assistant United States Attorney (1980-1983, 1992-1999), typically, my client has been the United States of America. As an Assistant United States Attorney, I appeared most often in criminal cases.

In 1999, I joined the Executive Office of the Governor for the State of Florida as the Chief Inspector General. As the Chief Inspector General, I did not have "clients". The General Counsel for the Office of the Governor, when necessary, acted as counsel to the Chief Inspector General's Office.

Since July 2002, I have represented Miami-Dade County. I represent the county, usually in a defensive posture in tort litigation, specifically in the areas of personal injury, civil rights and housing litigation, in state and federal courts. I also provide advice and counsel to the Miami-Dade County Board of County Commissioners and various agencies, including but not limited to the Department of Human Services, the Community Action Agency, the Miami-Dade Housing Agency, the Miami-Dade Housing Agency Development Corporation, the Domestic Violence Oversight Board and the Youth Crime Task Force, Community Action Agency, Miami-Dade Fire Rescue and the Miami-Dade Police Department on a variety of issues including but not limited to contract, procurement, real property transactions and employment.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

I frequently appeared in court from 1978-1984 as an attorney. I also appeared in courts as a judicial officer when I served as United States Magistrate Judge from 1984-1992. I appeared in court less frequently as an Assistant United States Attorney for the Southern Division of Florida. Since I joined the County Attorney's Office in 2002, I appear frequently in court.

2. What percentage of these appearances was in:
   (a) federal courts;
   (b) state courts of record;
   (c) other courts.

   For period 1978--1999
   Courts—

   (a) Federal Courts: 80.00%
   (b) State Courts of Record: 20.00%

   For period 2002
   Courts—

   (a) Federal Courts: 40.00%
   (b) State Courts of Record: 60.00%

3. What percentage of your litigation was:
   (a) civil;
   (b) criminal.

   (a) Civil: 60%
   (b) Criminal 40%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

   I have tried 30-40 cases to verdict or judgment. In the majority of these cases, I was the sole or lead counsel.

5. What percentage of these trials were:
   ((i) jury—99%
   (ii) non-jury – 1%

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

   (a) the date of representation;
   (b) the name of the court and the name of the judge or judges before whom the case was litigated; and
   (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

As a staff attorney for legal services, I tried a number of non-jury landlord-tenant, consumer protection and collection matters. However, the records in these matters have been archived and/or destroyed.

As an Assistant United States Attorney, I tried a number of cases to verdict. These cases have been archived at the Federal Records Center and I an unable to retrieve the information. However, while an Assistant United States Attorney, I tried a variety of cases including but not limited to mail fraud, interstate transportation of stolen property, and theft from the United State mail as well as theft from interstate shipment. The following reported cases are representative of my work during the period:

Case Name/Synopsis

1. United States v. Trickey
   711 F 2d 56 (6th Cir. 1983) (counsel)

   The defendant and his son operated a rural counterfeit currency printing operation. This family operation was poised to print thousands of counterfeit bills and inundate the local economy with bogus currency. The defendant

was convicted at trial. However, defendant appealed, arguing that the trial judge did not suppress illegally seized evidence. The United States Court of Appeals for the Sixth Circuit held that despite the fact that the building housing the printing operation was located outside the normal home perimeter, the defendant processed a reasonable expectation of privacy given the blackened windows. The judgment of the district court was reversed and remanded for a new trial.

Judge

Honorable Nathaniel Jones
United States Court of Appeals for the
Sixth Circuit

Opposing Counsel

Richard Lee, Jr.
213 E. Main Street
Midland, MI 48226
(969) 631-8104

Case Name/Synopsis

2. United States v. Holman
728 F. 2d 809 (6th Cir. 1984) (counsel)

The defendant was charged with assault on a mail carrier. The defendant entered a plea pursuant to a plea agreement. At the time of the plea colloquy, the court was silent as to the acceptance of the plea and the plea agreement. After the defendant entered the plea, the court ordered a presentence report. The report revealed information unknown to counsel. The trial court thereafter rejected the initial plea agreement. A trial date was set, however, the defendant entered a plea pursuant to a new agreement. He was sentenced pursuant to the second plea agreement; nevertheless, the defendant appealed the judge's rejection of the initial agreement. The appellate court held that the ambiguity of the acceptance of the initial agreement was cured by the acceptance of the second agreement. The conviction was upheld. The appellate case clarified the duty of the trial judge to clearly state, on the record, whether the acceptance of the plea agreement and the guilty plea is conditioned on the information contained in the presentence report.

Judge

Honorable Edward Johnstone
United States Court of Appeals for the
Sixth Circuit

Opposing Counsel

Darwyn P. Fair
Darwyn P. Fair and Associates
615 Griswold, Suite 320
(313) 967-0595

Case Name/Synopsis

3. United States v. Chandler
(Spring 1983)(counsel)

The defendant, a wholesale diamond broker, reported that diamonds he used as collateral for a bank loan were stolen from his business. The insurance company paid off the bank loan. The defendant later sold several diamonds, including a rare "D" flawless, which had been part of the stolen cache, to other diamond brokers. The defendant was charged with mail fraud based upon the filing of the claim of loss to the insurance company. At trial a certified gemologist testified that to a reasonable degree of certainty to the trade, that the diamonds the defendant sold were indeed the diamonds used as collateral on the loan. The trial judge accepted the gemologists as an expert in the field of identification and valuation of diamonds. This case was unusual in the use of gemologist testimony to "identify" rather than merely "value" diamonds for sale or transfer. The defendant was convicted.

Judge

Honorable Anna Diggs-Taylor
United States District Court
Eastern District of Michigan

Opposing Counsel

James Howarth
645 Griswold, Suite 2000
Detroit, MI 48226
(313) 962-3500

As Executive Assistant United States Attorney and as Director of Professional Development Training, I did not maintain an active caseload. Listed below are examples of matters that I did have the opportunity to litigate:

Case Name/Synopsis

4. In re: the Matter of the Extradition of Maria Fandino, 92-3340-Johnson (co-counsel)

I was the co-counsel with another Assistant United States Attorney. I argued the case before the United Magistrate Judge. This case involved the extradition of a Peruvian national. The Peruvian government alleged that the defendant fraudulently manipulated the Single Foreign Exchange Market to obtain millions of dollars for companies owned or controlled by the defendant, or the defendant's husband. The defendant contested extradition. A two-day extradition hearing was held. A variety of witnesses, including officials of the Peruvian government testified. The Peruvian government hired a major law firm to represent the interest of their country in this matter within the United States. This extradition matter indicates the importance that all parties: the Department of State, the country seeking extradition, the United States Attorney's Office must cooperate to effectively handle these matters. The defendant was ordered extradited.

Judge

United States Magistrate Judge Linnea Johnson
United States District Court
Southern District of Florida

Counsel

Co-Counsel

Arimentha Walkins
Assistant United States Attorney
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9100

Mark Cymrot
Baker & Hostetler, LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
(202) 861-1500

Opposing Counsel

Melvin S. Black
Melvin S. Black, P.A.
2937 SW 27th Avenue, Suite 202
Grove Forest Plaza
Miami, Fl 33133
(305) 443-1600

Case Name/Synopsis

5. United States v. Rodriguez
93-4930
United States v. Fantauzzi
93-4963
(Consolidated for appeal) (co-counsel)

I was co-counsel on this case with another Assistant United States Attorney. I wrote the brief for the government filed in the United States Court of Appeals for the Eleventh Circuit. The defendants were convicted of possession with intent to distribute heroin. On a return flight from Bogotá, Columbia the defendants, traveling companions, were questioned as they exited customs. A visual search of each defendant revealed packets containing a white powder substance. The substance was later determined to be heroin. The defendants filed a motion to suppress and the matters were consolidated for hearing. The trial court found that that there was a reasonable articulable suspicion as the basis for the search of the defendants. The defendants appealed. The convictions were affirmed.

Trial Judge(s)

Honorable Stanley Marcus
Honorable Ursula Ungaro-Benages
United States District Court
Southern District of Florida

Counsel

Co-Counsel

Harriett Galvin
Assistant United States Attorney
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9100

Opposing Counsel

Pamela Perry
Kenny, Nachwalter
Counsel for Yvonne Rodriguez
201 S. Biscayne Blvd.; Suite 1100
Miami, Florida 33131
(305) 373-1000

Howard M. Srebnick
201 S. Biscayne Blvd.; Suite 1300
Miami, Florida 33131
(305) 371-6421

Case Name/Synopsis

6. United States v. Guerillmo Quinones
97-462-CR-Moreno (co-counsel)

I was the primary counsel for the government in this case. I performed most of the trial work on this matter. The defendant, Quinones was charged with possession with intent to distribute a controlled substance. The defendant did not directly handle the delivery of the controlled substance, however, bank records and other documents proved that he "bank-rolled" the operation to buy bulk cocaine from Latin America to distribute in South Florida. The use of bank records and the testimony of bank employees were critical to establish the defendant's major role in this case. The defendant was convicted.

Judge

Honorable Federico Moreno
United States District Court
Southern District of Florida

Counsel

Co-Counsel

Harry C. Wallace
Assistant United States Attorney
99 N.E. 4th Street
Miami, Florida 33132
(305) 961-9100

Opposing Counsel

Roy Black
201 S. Biscayne Blvd.; Suite 1300
Miami, Florida 33131
(305) 371-6421

Significant Matters Since 2002:

Case Name/Synopsis

7. Martin v. Miami-Dade County
01-3044 CIV-JORDAN (lead counsel for the County Defendants)

I was the lead counsel for Miami-Dade County and a Miami-Dade County police officer charged with civil rights violations. The plaintiff sued Miami-Dade County, as well as a Miami-Dade county police officer and a Pizza Hut restaurant alleging civil rights violations, false arrest and malicious prosecution. The plaintiff, a 10-year-old-boy, kicked his mother in a Pizza Hut restaurant. His stepfather then forcibly removed him from the restaurant. At the urging of other restaurant patrons who viewed the father's actions, the waitress who observed the plaintiff kicking his mother called the police. The plaintiff was subsequently arrested on the charge of domestic battery and detained in the Juvenile Assessment Center for 16 hours. The plaintiff contended that the arrest and subsequent detention were improper. The plaintiff also contended that Miami-Dade County had a custom and policy of

detaining juveniles for extended periods of time without access to parents and/or guardians.

In a Motion for Summary Judgment, Miami-Dade County maintained that the police officer possessed probable cause to arrest the plaintiff on the charge of domestic battery and therefore the police officer possessed qualified immunity from suit. The County further maintained that there was no evidence to establish that the County had a custom or policy of detaining children in the Juvenile Assessment Center. The Court agreed and granted the motion.

Judge

Honorable Adalberto Jordan
United States District Court
Southern District of Florida

Counsel

Co-Counsel

Christopher Knight
Fowler, White, Burnett
Bank of America Tower
100 SE 2nd Street
Miami, Florida 33131
Telephone: (305) 789-9200
Facsimile: (305) 789-9201

Jennifer Lucy
Fowler, White, Burnett
Bank of America Tower
100 SE 2nd Street
Miami, Florida 33131
Telephone: (305) 789-9200
Facsimile: (305) 789-9201

Opposing Counsel

Alexander Kapetanakis
1101 Brickell Avenue
Miami, Florida 33131
(305) 379-9007

8. **Case Name/Synopsis**

Machin v. Miami-Dade County, et al
02-31867 CA9 Schumacher

In this litigation, I represented the Miami-Dade County and two Miami-Dade County police officers. The plaintiff, a husband and wife, alleged that Miami-Dade County and the police officers violated their civil rights. On February 11, 2001, the defendant police officers responded to the home of the plaintiffs to conduct an investigation of criminal mischief. In the course of the investigation, the defendant officers attempted to discuss the matter with the plaintiffs. During the discussion the officers remained outside the plaintiffs' home, on the front porch area. The plaintiffs remained inside the home, standing in the vestibule area. The plaintiff wife became loud and belligerent with the officers as they attempted to talk to her husband about the incident, involving the plaintiffs teenaged male child. During the course of the conversation with the plaintiff husband the officers asked the plaintiff wife to please be quiet and to stop screaming and yelling. She refused and after several warnings, one of the officers reached into the vestibule, grabbing the plaintiff wife by the arm and removing her from the home. The plaintiff wife was placed in the rear of the marked police car. The officers charged her with the crime of resisting a police officer without violence pursuant to Florida law. The plaintiff wife refused to accept a release to appear citation and was then transported to the police precinct, processed and taken the female detention center. She was released several hours later. The plaintiffs argued that the reaching into their home constituted an unlawful seizure under the Florida and United States constitution. Florida statute, 901.19(1) explains that an officer has the right to enter a dwelling in two circumstances, (1) to execute a warrant after the officer has announced his purpose and failed to gain admittance and (2) when the officer is authorized to make an arrest for a felony. Florida courts have interpreted these statutes as barring entry into a person's home to make a misdemeanor arrest without a warrant for any reason. However, the United States Supreme Court has held that an arrest for a misdemeanor that takes place in a person's home is not altogether barred, but rather has a rebuttable position of unreasonableness. There is precedent in this jurisdiction concerning the boundaries for a warrantless entry into the home of a misdemeanant. An officer may enter a dwelling in order to make a warrantless arrest for a misdemeanor, if that misdemeanor

is committed in the presence of the officer. McBride v. United States, 284 F. 416, 419 (5thCir 1922). Although McBride has not been cited for this legal proposition in Florida with any regularity, it has never been explicitly overruled and thus remains binding on the decisions of the 11th circuit. Bonner v. Prichard, 661 F2d 1206, 1209 (11th Cir.1981) (en banc). In a confidential agreement, the matter was settled prior to trial.

Judge

Honorable Marc Schumacher
Eleventh Judicial Circuit of Florida

Counsel

Opposing Counsel

Gregory Herskowitz
The Herskowitz Law Firm
Datran Center
9100 South Dadeland Blvd.
Miami, FL 33156
(305) 670-0101

9. Quintero v. Miami-Dade County, et al
03-3044 CIV-UNGARO-BENAGES (lead counsel for the County Defendants)

I am the counsel for Miami-Dade County and the Miami-Dade county police officer sued in this case. The plaintiff sued Miami-Dade County and Miami-Dade County police officers alleging civil rights violations, false arrest and malicious prosecution. The plaintiff alleges that the defendants incorrectly identified him as a fugitive felon when he was stopped for a motor vehicle equipment violation. The defendant alleges that Miami-Dade County has inadequate policies concerning the accurate identification and arrest of fugitives. Miami-Dade County contends that it has adequate policies and that all appropriate policies and procedures were followed on the day of the plaintiff's arrest. Based on the identifying information provided to the defendants, plaintiff's arrest and detention were appropriate. The trial in this matter is scheduled for July 2004.

Judge

Honorable Ursula Ungaro-Benages
United States District Court
Southern District of Florida

Counsel

Opposing Counsel

Charles M. Baron
290 N.W. 165th Street
North Miami Beach, FL 33169
(305) 379-9007

Case Name/Synopsis

10. Safespace Foundation, Inc., v. Miami-Dade County Domestic Oversight Board, et al
03-18342 CA2–Friedman

In this litigation, I represented the Miami-Dade County Domestic Oversight Board, volunteer members of the board and other Miami-Dade County defendants. In December 2002, Miami-Dade County, through the Miami-Dade County Domestic Violence Oversight Board ("DVOB"), issued a Request for Proposal ("RFP") for an operator of a domestic violence shelter/center. On review, Miami-Dade County determined that flawed language in the RFP affected the fair and competitive nature of the bidding process and decided to reject all the bids and re-bid the project. A new RFP issued in June 2003. The plaintiff sued alleging that it filed the only responsive application to the December 2002 RFP and that the rejection of the December RFP was illegal. The trial judge ruled that it was well within the right of Miami-Dade County to reject all bids and reissue the RFP. The case was dismissed.

Judge

Honorable Ronald Friedman
Eleventh Judicial Circuit of Florida

Counsel

Opposing Counsel

Elizabeth S. Baker
6701 Sunset Drive, Suite 103
Miami, FL 43
(305) 669-9400

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question; please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

I have participated in a number of legal activities that involve emerging areas of federal law, issues related to statutory construction and developing legislative history, coordinating difficult and time consuming projects of public importance, immigration law, the functions of the federal court system and the federal correctional system, as well as civil rights and equal opportunity. The below activities did not result in litigation, yet illustrate my ability to provide advice and counsel and instruction on a variety of federal and state legal issues.

Health Insurance Portability and Accountability Act (HIPAA)

In January 2003, I became the legal liaison working with the agencies and departments of Miami-Dade County to effectuate compliance with the Health Insurance Portability and Accountability Act (HIPAA) prior to the April 14, 2003 statutory deadline. I worked with staff to draft Miami-Dade County's Administrative Order on privacy practices and confidential information. I also worked with the various County agencies and departments to draft internal privacy and confidentiality practices and policies. In order to effectively perform this duty, I had to learn a new area of the law and advise on the applicability of the law to specific fact situations within county government within a very brief period of time.

Public Corruption Study Commission

Governor Jeb Bush signed Executive Order 99-237 on September 15, 1999, establishing the Public Corruption Study Commission. The fifteen-member commission was tasked to complete a comprehensive review of current laws, policies and procedures related to Florida's response to public corruption, and prepare specific recommendations on how Florida might better prevent and respond to acts of public corruption. The Commission was specifically tasked to review

Florida and Federal current statutes and laws concerning public corruption; violation of ethical standards; conflicts of interest; malfeasance, misfeasance, and nonfeasance in office; bribery; and other forms of official misconduct. Governor Bush appointed me to chair the Commission. The Commission issued a report recommending comprehensive changes to Florida public corruption statutes, including but not limited to a massive restructuring of the statute, increased penalties for corruption offenses and ethics education and training and reform of financial reporting requirements. I was responsible, as the head of the Commission, to draft legislation, to withstand constitutional challenge, to overhaul the appropriate statutes in Florida dealing with corrupt public officials. The legislature substantially adopted these changes during the 2003 legislative session.

Miami Financial Oversight Board

I served as the representative for the Governor on the Miami Financial Oversight Board from 1999-2001. In 1996, the City of Miami suffered severe financial reversals. To prevent the financial demise of the city, including the possibility of bankruptcy, the city sought the assistance of the then Governor of the state of Florida. Florida statutes give the Governor the ability to provide technical assistance to a city or other special district in financial emergency. The City of Miami and the State of Florida, through the Executive Office of the Governor, negotiated an intergovernmental agreement. The agreement created a financial oversight board to assist the city as it established a financial plan. The oversight board provided the city with the help and guidance needed to establish a long term financial plan, boost reserves and regain the confidence of the financial markets.

Attorney General's Working Group on Citizenship USA (CUSA)

In 1995, the number of naturalization applications filed with the Immigration and Nationalization Service (INS) dramatically increased. The surge in applications resulted in an ever-increasing backlog of naturalization applications. A majority of these applications were filed in the Southern District of Florida. To address the increasing backlog, the INS instituted the Citizenship USA (CUSA) program, which streamlined the naturalization process to more efficiently process the applications. In 1996, the CUSA initiative came under intense congressional scrutiny when it was learned that individuals with criminal records were improperly naturalized.

A working group within the Department of Justice was formed in June 1997. The purpose of the working group was to develop an appropriate and legal process, comporting with due process requirements, to denaturalize improperly naturalized individuals. I was the representative from the United States Attorney's Office for the Southern District of Florida. The United States Attorney for the Southern District of Florida anticipated substantial denaturalization litigation would be filed in the district. I worked with the group to develop litigation protocol. In addition to developing

litigation requirements, the working group also had to establish a public relations protocol emphasizing that denaturalization did not automatically require deportation.

Ultimately, the working group developed a litigation strategy to initiate a civil proceeding in district court requiring the government to prove that the naturalization was procured by concealment of a material fact or misrepresentation, 8 U.S.C. § 1451(a). I was able to broaden my skill set in immigration and naturalization law and devise an effective strategy for litigation within the federal court system that protects the United States from the inadvertent naturalization of criminal aliens, while appropriately protecting the due process rights of aliens seeking naturalization.

Federal and State Immigration Law Enforcement Symposium, January 25-26, 1996

On January 25-26, federal and state agencies convened a symposium to discuss the management of immigration policy within the state of Florida. While Director of Professional Development, I worked with the United States Attorney for the Southern District of Florida and two other Assistant United States Attorneys planning the symposium including developing an outline for presentation and coordinating the workshops and panels. The forum was an opportunity for Florida's elected representatives, immigration and law enforcement officials, and members of the community to discuss immigration challenges within the state. I served as one of the symposium coordinators and prepared the symposium report and summary.

Hurricane Andrew Prison Project

During Hurricane Andrew, the Metropolitan Correction Center, housing over a thousand inmates in pretrial detention, was substantially damaged. The Marshal's Service, under difficult conditions, managed to safely evacuate the detainees to various federal and state detention centers in the southeastern United States. Chief Judge Norman Roettger, by order, formed a working group with the Marshal's Service, the United States Attorney's Office and the Federal Public Defender, headed by United States Magistrate Judge Lurana Snow, to coordinate inmate placement and to track inmates during the six months that the district operated without the detention center. While serving as Executive Assistant United States Attorney, I was the coordinator for the United States Attorney's Office. With the assistance of the court and coordination with the United States Attorney's Office, the district developed a plan that included decreasing court hours to allow extended travel time, publishing court calendars in advance, and limiting the days incarcerated witnesses would be held in the district. This plan enabled the district to operate without a fulltime detention center for six-months. The Metropolitan Correction Center opened on February 23, 1993.

Prisoner Writ Program

As Executive Assistant United States Attorney, I assisted in the development of a program, in conjunction with the Marshal's Service to prevent overcrowding at the Federal Detention Center. An automatic tickler system was developed to send prisoners back to the designated penal institutions. The United States Attorney's Office utilized a management analyst as the "prisoner liaison" with the Bureau of Prisons and the United States Marshal's Service. The three offices developed a central system to docket outstanding writs.

Civil Rights Forum

As Executive Assistant, I participated in the organization and coordination of a Civil Rights Symposium to discuss the issue of police brutality and the use of excessive force. The forum was held in February 1993. Members of the federal, state and local law enforcement communities gathered to discuss issues related to excessive force. Over two hundred members of the law enforcement community, citizens groups, and students attended the forum. The forum panels were taped and re-broadcast several times over local access cable television.

Fair Housing Seminar

The United States Attorney's Office, in conjunction with the Department of Housing and Urban Development and the Housing Opportunities Project for Excellence (HOPE,), held a seminar to discuss issues related to fair and equal housing opportunities in South Florida. The seminar discussed issues related to occupancy (leasing and rentals) of residential property and purchase of residential property (mortgage lending). Property managers, owners of large rental complexes, bankers, lending officers, compliance officers and members of the community attended the daylong seminar. As Executive Assistant I participated in the planning, organization and coordination of the seminar.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

   I participated in the Deferred Compensation Program under the State of Florida Retirement System. The money is reinvested in the chosen fund accounts. I have included the value of that account in my financial disclosure. I have not vested in the State of Florida retirement program.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present potential conflicts-of-interest during your initial service in the position to which you have been nominated.

   I will follow the guidelines of the Code of Judicial Conduct, 28 USC 455, in dealing with any conflict of interest. Litigation where the State of Florida, or Miami-Dade County, is a party presents the most potential for conflict of interest. I will recuse myself from any matter that I worked on directly, or tangentially, as Chief Inspector General and as an Assistant County Attorney.

   I would utilize the criminal and civil cover sheets to identify the litigants and determine if the state of Florida or Miami-Dade County is a party. The cover sheets will also be used to determine the dates when the cause of action arose. This will enable me, with the assistance of court staff to quickly identify matters that occurred during the period of time I was Chief Inspector General and employed as an Assistant County Attorney. I will be then able to determine cases where there is a potential for conflict.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

   I plan, if appropriate and time permitting, to continue to teach trial practice and trial techniques with the National Institute of Trial Advocacy at invited law schools. I also plan to continue teaching, time permitting, in the Litigation Skills Program at the University of Miami.

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

   Please see Attached Financial Disclosure Report

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

   Please see Attached Net Worth Statement

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

   No

AO-10
Rev. 1/2002

AMENDED FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2002

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Cooke, Marcia G	Southern District of Florida	December 1, 2003
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)*	**5. Report Type (check** ___ Nomination, X Date	**6. Reporting Period**
United States District Court Judge	November 25, 2003	January 2002-November 2003
7. Chambers or Office Address	**8.** On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.	
111 NW 1st St, Suite 2810 Miami, FL 33129	Reviewing Officer _____ Date _____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
	NONE (No reportable positions.)	
1	Assistant County Attorney	Miami-Dade County
2	Chief Inspector General	State of Florida
3	Board of Directors	Georgetown University
4.	Board of Directors	Miami Federal Credit Union

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
X	NONE (No reportable agreements.)	
1		
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME (yours, not spouse's)
	NONE (No reportable non-investment income.)		
1			
2	2001	State of Florida (salary)	$110,000
3	2002	State of Florida (salary)	$60,000

4			
5	2002	Miami-Dade County (salary)	$60,000
	2002	University of Miami (teaching)	$ 2, 500

(see below)
FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Cooke, Marcia G	December 1, 2003

IV. REIMBURSEMENTS – transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
X	NONE (No such reportable reimbursements.)	
1		
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
X	NONE (No such reportable gifts.)		
1			
2			$
3			$
4			$
			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION	VALUE CODE*
	NONE (No reportable liabilities.)		
1			
2	Washington Mutual Bank	Mortgage on Rental Property	L
3			
4			
5			

6

*Value Codes: J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000		P2=$5,000,001-$25,000,000	
P3=$25,000,001-$50,000,000	P4=$50,000,001 or more			

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting: Cooke, Marcia G	Date of Report: December 1, 2003

VII. Page 3 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

	A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month - Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐	NONE (No reportable income, assets, or transactions.)									
1	Rental Property -Detroit Michigan	D	Rent	W	R					
2	Citibank (IRA) (Fidelity Advisor Technology/Janus Fund Inc/Putnam International Equity)	E	Dividend	L	T	Sell (partial)	July 2003	J		Self
3	State of Florida Deferred Compensation Plan (American Funds/Wash Mutual, Dreyfus, Janus Growth)	E	Dividend	L	T					
4.	Life Insurance (CNA)	E	Dividend	L	T					
4	Citibank (IRA) (Fidelity Advisor Technology/Janus Fund Inc/Putnam [illegible])	E	Dividend	L	T	Sell (partial)	July 2002	J		Self
5										
6										
7										
8										
9										
10										
11										
12										
13										
14										
15										

67									
68									
69									
70									

Name of Person Reporting	Date of Report

FINANCIAL DISCLOSURE REPORT

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

III (Non Investment Income)

2002	**National Institute of Trial Advocacy**	**$5,000**
2003	**Miami-Dade County**	**$130,000**
2003	**University of Miami (teaching)**	**$2,500**

IX. CERTIFICATION.

1	Income/Gain Codes: E=$15,001-$50,000 (See Col. B1, D4)	A=$1,000 or less	B=$1,001-$2,500	C=$2,501-$5,000	D=$5,001-$15,000
		F=$50,001- $100,000	G=$100,001-$1,000,000	H1=$1,000,001-$5,000,000	H2=More than $5,000,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less	K=$15,001-$50,000	L=$50,001- $100,000	M=$100,001-$250,000
		N=$250,001-$500,000	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000	P2=$5,000,001-$25,000,000
		P3=$25,000,001-$50,000,000		P4=More than $50,000,000	
3	Value Method Codes: Q=Appraisal (See Col C2)	R=Cost (real estate only)	S=Assessment	T=Cash/Market	
		U=Book value	V=Other	W=Estimated	

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Marcia S. Cooke **Date** January 3, 2004

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS		LIABILITIES	
Cash on hand and in banks	5,000	Notes payable to banks-secured	34,000.00
U.S. Government securities-add schedule	none	Notes payable to banks-unsecured	8,000.00
Listed securities-add schedule	none	Notes payable to relatives	none
Unlisted securities--add schedule	none	Notes payable to others	none
Accounts and notes receivable:	none	Accounts and bills due	none
Due from relatives and friends		Unpaid income tax	none
Due from others		Other unpaid income and interest	none
Doubtful		Real estate mortgages payable-add schedule	170,000
Real estate owned-add schedule (see schedule)	335,000	Chattel mortgages and other liens payable	34,000
Real estate mortgages receivable	none	Other debts-itemize:	
Autos and other personal property	100,000.	Auto	23,000.00
Cash value-life insurance	75,000.00	Credit Cards	9,000.00
Other assets itemize:			

		Total liabilities	278,000
		Net Worth	162,000
Total Assets	440,000	Total liabilities and net worth	440,000
CONTINGENT LIABILITIES		GENERAL INFORMATION	
As endorser, co maker or guarantor	none	Are any assets pledged? (Add schedule)	none
On leases or contracts		Are you defendant in any suits or legal actions?	none
Legal Claims	none	Have you ever taken bankruptcy?	no
Provision for Federal Income Tax	none		
Other special debt	none		

Financial Statement
Real Estate Table*

Property Address	Fair Market Value	Balance on Mortgage
Detroit, Michigan	$150,000	$63,000 Washington Mutual Bank
Bay Harbor Islands, FL	$185, 000	$107,000 Washington Mutual Bank
Total	$335,000	$170,000

* As of September 30, 2003

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

   I have worked with the recruiting committee for Big Brothers/Big Sisters in Miami-Dade County to recruit volunteers to serve in disadvantaged areas. I also worked with the Kids Voting Project. The project encourages civic responsibility and building voting habits in young people in grade and middle schools.

   While a lawyer and United States Magistrate in Detroit, I worked with the Street Law Project. The project encourages civic participation and responsibility.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

   No

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

   There is a selection committee in my jurisdiction. I submitted an application to the committee. Approximately twenty-four people applied for the vacancy, due to the death of United States District Judge Wilkie D. Ferguson, Jr. The committee interviewed fifteen of the applicants. I was one of six candidates recommended to the President. Thereafter, members of the White House Counsel's Office, including the Deputy White House Counsel, and a staff member of the Office of Legal Policy, interviewed me. The interview took approximately thirty minutes.

Senators Bob Graham and Bill Nelson interviewed me, via telephone approximately one week later. I completed a variety of forms and underwent an FBI background investigation. The President nominated me on November 25, 2003.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The federal judicial system is designed to resolve real conflicts between real parties with actual injuries. The role of the trial judge is to resolve the issues of the litigants in the specific case before the judge at the time, not fashion broad-policy-based

remedies. The role of policymaker is the role of the legislative branch, not the judiciary.

It is necessary before any litigation proceeds, that the court determine that the case is justiciable, that the parties have standing to proceed, that there is a case and/or controversy before the court and that the claims are not moot. The case should not proceed until the judge has analyzed justiciability, standing and mootness. A judge should not loosen these jurisdictional requirements in an attempt to proceed with a case that should not be in court.

If it is determined that a case meets the qualifications to proceed, the judge should apply the law established by the Constitution, statutes or principles of law already established and decided. This doctrine of *stare decisis* requires that the legal principles decided in one case be followed in the next. The doctrine of *stare decisis* creates a precedent-bound system that enables a judge to apply the legal principles in an earlier case to decide the present case or controversy. The principle of *stare decisis* creates stability and predictability in the courtroom. These precedents are important. Therefore, it is the role of the judge to decide the matter within the rule of law previously established.

Senator CORNYN. Ms. Boyle, I would be glad to hear any opening comments you would care to make.

STATEMENT OF JANE J. BOYLE, NOMINEE TO BE DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF TEXAS

Ms. BOYLE. Chairman Cornyn, I do not have an opening either, but I would like to thank you for your kind remarks, and also than Senator Leahy and the rest of the Committee for having this hearing and including me on the panel. I appreciate that very much.

I also would like to thank Senator Hutchison for her kind remarks as well.

You have met my family, so I will not reintroduce them, but it is a tremendous honor to be here today. Thank you.

[The biographical information of Ms. Boyle follows:]

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used.)

Jane Jackson Boyle (married name)
Jane Ellen Jackson (maiden name)

2. Address: List current place of residence and office address(es).

Residence: **Dallas, Texas**
Office: **United States Attorney's Office**
1100 Commerce, Dallas, Texas 75242

3. Date and place of birth.

December 15, 1954; Sharon, Pennsylvania

4. Marital Status (include maiden name of wife, or husband's name). List spouse's occupation, employer's name and business address(es).

Married, November 23, 1985 to John Joseph Boyle.
Occupation: Attorney, self-employed, PO Box 670701 Dallas, Texas 75367

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

August 1978-May 1981:
Southern Methodist University, School of Law, J.D., June 1981

September 1974-August 1977:
University of Texas at Austin, Texas, B. S. in Advertising, August 1979

September 1973-May 1974:
Florida State University, Tallahassee, Florida, (9/74 transferred to University of Texas at Austin)

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

April 2002-present:

United States Attorney, Northern District of Texas
1100 Commerce, 3rd Floor
Dallas, Texas 75242

March 1990-April 2002:

United States Magistrate Judge, Northern District of Texas, Dallas Division, 1100 Commerce, Rm. 15C40
Dallas, Texas 75242

February 1987-March 1990:

United States Attorney's Office, Northern District of Texas, Dallas Division 1100 Commerce, 3rd floor
Dallas, Texas 75242-1699:

1987-1989- Criminal Section Attorney
1989-1990- Civil Section Attorney

June 1981-February 1987:

Dallas County District Attorney's Office,
133 N. Industrial Blvd., LB 19
Dallas, Texas 75207-4399:

1981-1985- Misdemeanor and Felony Prosecutor
1985-1987- Chief Felony Prosecutor, Major Commercial Fraud Section of the Specialized Crime Division

January 1981 - June 1981:

Law Offices of Dennis Brewer,
law clerk
1159 Cottonwood # 150
Irving, TX 75039

January 1980-December 1980:

Newman, Shook & Newman law firm,
contract law clerk
2323 Bryan St. LB # 135

(law firm no longer exists)

March 1979 - August 1979:

Shank, Irwin, Williamson and Grevelle, law firm,
receptionist
3100 First National Bank Bldg.
Dallas, TX 75242
(law firm no longer exists)

August 1977- August 1978:

Marriott Hotels,
waitress
7750 LBJ Fwy.
Dallas, TX 75251

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

I have never served in the military.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees, and honorary society memberships that you believe would be of interest to the Committee.

1977 Graduated with Scholastic Honors from the University of Texas at Austin

1977 Elected to membership in Alpha Delta Sigma Honorary Society of the American Advertising Federation for superior scholastic performance.

1986 Cash award from the Dallas County District Attorney's Office for outstanding work

1988 U.S. Department of Justice Special Achievement Award for outstanding work.

1988 U.S. Postal Inspection Service Certificate of Appreciation for outstanding work

1989 Internal Revenue Service Assistant Commissioner's Award for outstanding work

1989 Drug Enforcement Administration Certificate of Appreciation for outstanding work

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Jan. 2001-Dec. 2001:	**Dallas Bar Association, Business Litigation Section, Vice-Chair**
Jan. 2001-Dec. 2001:	**Dallas Bar Association, Pro Bono Activities Committee, Co-Chair**
Jan. 2000-Dec. 2000:	**Dallas Bar Association, Business Litigation Section, Secretary**
Jan. 2000-Dec. 2000:	**Dallas Bar Association, Pro Bono Activities Committee, Vice-Chair**
Jan. 1999-Dec. 1999:	**Dallas Bar Association, Business Litigation Section, Treasurer**
Dec. 1998-Dec. 2001:	**Dallas Bar Foundation, Trustee**
1998-present:	**Texas Bar Foundation, Member**
1996-present:	**Dallas Bar Association, Business Litigation Section, Council Member**
1984-present:	**Dallas Bar Association, Member**
1995- 1997:	**American Inns of Court, William "Mac" Taylor Chapter, President**
1990-2001:	**United States Magistrate Judges Association**
1981-present:	**State Bar of Texas, Member**

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

I do not presently belong to any organizations that are active in lobbying before public bodies.

Other Organizations to which I belong:

2002-present:	**Greater Dallas Crime Commission, Member**
2002-present:	**Safe City USA, Steering Committee of Fort Worth, Member**
2002-present:	**Dallas Alliance on Underage Drinking, Co-Chair**
2002-present:	**North Texas High Intensity Drug Trafficking Area Program, Vice-Chair**
2002-present:	**Family Violence Prevention Council, Commissioner**
2002-present:	**International Women's Forum, Dallas Chapter, Member**
2002- present:	**Brookhaven Country Club, 3333 Golfing Green Dr., Member**

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if any such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

1981	**Texas Supreme Court and all Texas Courts**
1984	**United States District Court for the Northern District of Texas- April 13, 1984**
1987	**United States Court of Appeals for the Fifth Circuit- February 13, 1987**

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Published Articles (copies attached):

1. **Judge Jane J. Boyle, *Tips For Effective Lawyering*, 1 Federal Bar Association Newsletter 2 (Nov. 2001)**

2. **Judge Jane J. Boyle, *The Federal Work Product Doctrine, A "How To" for Litigators*, 59 Tex. B. J. 534 (1996)**

3. **Jane E. Jackson, *Judge Edith Hollan Jones, A Personal Profile,* 7 Fifth Circuit Reporter 57 (Nov. 1989)**

4. **Janie Jackson, "*Defend Yourself*" 13 The Advocate (SMU Law School Newspaper) No. 10 (October 31, 1980)**

5. **Janie Jackson, "*Remainderman Reports on Larsen Retirement*" 12 The Advocate (SMU Law School Newspaper) No. 2 (September 7, 1979)**

6. **Jane Jackson, "*Ray Lecture Tops Law Day Activities*" 11 The Advocate (SMU Law School Newspaper) No. 17 (March 2, 1979)**

7. **Jane Jackson, "*In House Counsel*" 11 The Advocate, (SMU Law School Newspaper) No. 16 (February 23, 1979)**

Speeches:

Federal Bar Association Speeches:

1. "*Perspectives of a Former Judge as United States Attorney*" delivered June 13, 2002, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242, for the Federal Bar Association's Luncheon honoring the judiciary. (no written or videotaped materials)

2. "*Sanctions in Federal Court*" delivered on March 15, 2001, at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas. (copies of the outline for the speech and the speech itself are attached)

3. "*Sanctions in Federal Court*" delivered on March 23, 2000, at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas (a copy of the outline for the speech is attached)

4. "*Sanctions in Federal Court*" delivered on March 20, 1998, at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas (a copy of the outline for the speech is attached)

5. "*Top Ten List of Effective and Ineffective Things Lawyers Do in Trial*" delivered December 10, 1997, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242, to the Federal Bar Association-Dallas Chapter's monthly luncheon. (a copy of the outline for the speech is attached)

6. "*Sanctions in Federal Court*" delivered on March 21, 1997, at the Junior Black Academy of Arts and Letters, 650 S. Griffin, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas. (a copy of the outline for the speech is attached)

7. "*The Role of the Federal Magistrate Judge*"delivered on March 22, 1996, at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas. (a copy of the outline for the speech could not be located by me or officers of the Federal Bar Association. However, except for minor updating, it is identical to my prior speeches on this topic)

8. "*The Role of the Federal Magistrate Judge*"delivered on March 24, 1995, at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas. (a copy of the outline for the speech is attached)

9. "*The Role of the Federal Magistrate Judge*"delivered on March 25, 1994 at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas. (a copy of the outline for the speech is attached)

10. "*The Role of the Federal Magistrate Judge*"delivered on March 26, 1993, at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas. (a copy of the outline for the speech is attached)

11. "*The Role of the Federal Magistrate Judge*"delivered on March 27, 1992, at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas. (a copy of the outline for the speech is attached)

12. "*The Role of the Federal Magistrate Judge*"delivered on March 28, 1991, at the J. Erik Jonsson Central Library, 1515 Young Street, Dallas, Texas 75201, for the Federal Bar Association's Civil Practice Seminar in Dallas, Texas. (a copy of the outline for the speech is attached)

State Bar of Texas Speeches:

13. "*Reflection of a New U.S. Attorney Post 9/11*" delivered June 14, 2002 at the Wyndham Anatole Hotel, 2201 Stemmons Freeway, Dallas, Texas, 75207 for the State Bar of Texas, Military Law Section. (no written or videotaped materials)

14. "*Corporate Fraud: The Focus of Our Chief Prosecutors*" panel discussion, delivered November 15, 2002 at the Radisson Hotel Astrodome, 8686 Kirby Dr., Houston, Texas, for the State Bar of Texas, Business Law Section.(no written or videotaped materials)

15. "*Mythical Things You Thought You Could Do At Trial, But You Can't*" delivered November 4, 1999, at the Omni Hotel, 9821 Colonnade, San Antonio, Texas, for the 22nd Annual Advanced Civil Trial Law Course sponsored by the State Bar of Texas. (a copy of the speech is attached)

16. "*Judges Panel Discussion on the Use of Special Masters in Patent Cases*" panel discussion delivered March 7, 1999, at the Omni Hotel in Austin, Texas for the Intellectual Property Section of the State Bar of Texas. (a copy of the outline for the speech is attached)

17. "*Recent Amendments to the Federal Rules of Civil Procedure*" was a 1994 videotaped discussion by a panel of magistrate judges, sponsored by the State Bar of Texas. It was delivered via videotape to several locations in Texas in 1994. (a copy of the videotape is enclosed)

18. "*Federal Criminal Appointments*" delivered September 23, 1994,at the Cityplace Conference Center, 2711 N. Haskell, Dallas, Texas for the Federal Court Practice Seminar sponsored by the State Bar of Texas (no written or videotaped materials)

Dallas Bar Association Speeches:

19. "*The Role of U.S. Attorney*" delivered on February 6, 2003 at the at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242 for the Dallas Association of Women Lawyers Association. (no written or videotaped materials)

20. "*U.S. Attorney's Office Initiatives*" delivered December 6, 2002 at the at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242, for the Friday Clinic for the Dallas Bar Association's CLE. (no written or videotaped materials)

21. "*Transition to United States Attorney*" delivered July 2, 2002, at the at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242, to the Dallas Association of Young Lawyers, Board of Directors. (no written or videotaped materials)

22. "*Judicial Panel Discussion on Employment Law Issues*" panel discussion delivered January 25, 2001, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242, for the Dallas Bar Association's Employment Law Section. (no written or videotaped materials"

23. *Seminar Designed To Introduce New Lawyers To the Dallas State and Federal Courts*" delivered October 8, 1999, at the George Allen Courts Building, Central Jury Room, 600 Commerce, Dallas, Texas 75240, sponsored by Dallas Bar Association's Business Litigation Section. (no written or videotaped materials)

24. "*The Role of the Federal Magistrate Judge*" delivered March 3, 1999, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75201, sponsored by Dallas Bar Association's Small and Solo Practitioner's Section.(a copy of the outline for the speech is attached)

25. "*Seminar Designed To Introduce New Lawyers To the Dallas State and Federal Courts*" delivered December 18, 1998,at the Fairmont Hotel, 1717 N. Akard, Dallas, Texas 75201, sponsored by Dallas Bar Association's Business Litigation Section. (no written or videotaped materials)

26. "*1993 Amendments To the Federal Rules of Civil Procedure*" delivered November 14, 1994, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75201, sponsored by Dallas Bar Association's Intellectual Property Law Section.(a copy of notes for the speech is attached)

27. "*The Federal Work Product Doctrine*" delivered September 13, 1994, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75201, sponsored by Dallas Bar Association's Business Litigation Section.(a copy of the outline for the speech is attached)

28. "*Appointments in Federal Criminal Cases*"delivered October 24, 1991, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242, for the Dallas Bar Association's Criminal Law Section.(a copy of notes for the speech is attached)

Other Speeches:

29. "*United States Attorney's Office' Efforts to Fight Substance Abuse and Violent Crime*" delivered September 17, 2003 at the Omni Hotel, 710 E. Campbell, Richardson, Texas, 75081, for the Richardson Community Action Network. (a copy of an outline for the speech is attached)

30. "*United States Attorneys' Forum on Corporate Fraud*", panel discussion, delivered on September 4, 2003 at the Radisson Plaza Hotel, 815 Main St., Fort Worth, Texas, for the 27th Annual Southwest Securities Enforcement Conference. (no written or videotaped materials)

31. "*Effective Advocacy in Pretrial Criminal Proceedings Before Magistrate Judges*" delivered August 20, 2003, at the United States Attorney's Office for the Northern District of Texas for CLE training for Assistant U.S. Attorney's in the Northern District of Texas. (a copy of the outline and notes for the speech is attached)

32. "*Initiatives and Goals of the United States Attorney's Office*" delivered July 10, 2003, at the Old San Francisco Steakhouse, 10965 Composite Drive, Dallas, Texas 75220, to Insurance Fraud" Unitrin P&C Insurance Group. (a copy of the speech is attached)

33. "*Cyber-Terrorists: What is the Federal Law Enforcement Community Doing* ?" delivered April 3, 2003 at the SMU Dedman School of Law, Hillcrest and Daniel Ave., Dallas, Texas, for the Computer Law Review and Technology Symposium sponsored by the SMU Dedman School of Law.(a copy of the speech is attached)

34. "*What Does the Government Attorney Expect of Corporate Counsel* ?" panel discussion delivered January 16, 2003 at J.C Penney, Inc.-Home Office Campus, 6501 Legacy Dr., Plano, Texas 75204 for the Texas Center For Legal Ethics and Professionalism. (no written or videotaped materials)

35. "*U.S. Attorney's Office Initiatives*" delivered November 25, 2002 at the Old San Francisco Steakhouse, 10965 Composite Drive, Dallas, Texas 75220 for the Society of Former Special Agents of the FBI. (no written or videotaped materials)

36. "*U.S. Attorney's Office Initiatives*" delivered November 21, 2002, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242, for the Dallas Bar Association Board of Directors. (no written or videotaped materials)

37. "*United States Attorney's Initiatives*" delivered November 19, 2002 at the Thorntree Country Club, 825 W. Wintergreen Rd., Desoto, Texas, for the Desoto Chamber of Commerce. (no written or videotaped materials)

38. "*National Security and Civil Liberties*" panel discussion delivered November 7, 2002 at the Jewish Community Center, 7900 Northhaven Rd., Dallas, Texas 75230, for the Jewish Community Relations Council of Greater Dallas, the American Jewish Committee Dallas Chapter, the American Jewish Congress, the Anti-Defamation League and the National Council of Jewish Women. (no written or videotaped materials)

39. "*Corporate Fraud: The Government Speaks* " panel discussion, delivered November 5, 2002, at the Cityplace Conference Center, 2711 North Haskell, Dallas, Texas, 75204, for the Criminal Justice Section of the American Bar Association. (no written or videotaped materials)

40. "*Project Safe Neighborhoods*" delivered October 25, 2002, at Thanksgiving Square, 1201 Elm St., Dallas, Texas, for YWCA-Women's Resource Center sponsoring: "A Week Without Violence." (no written or videotaped materials)

41. "*Corporate America-Regaining Public Trust*" panel discussion delivered October 23, 2002, at Union Station, 400 S. Houston St., Dallas, Texas, for the Dallas Rotary Club.(no written or videotaped materials)

42. "*When Two Worlds Collide*-Parallel Civil and Criminal Proceedings " panel discussion delivered on October 10, 2002 at the Adolphus Hotel, 1321 Commerce, Dallas, Texas, 75242, for the Dallas Association of Young Lawyers.(a copy of an outline for the discussion is attached)

43. "*Employment Opportunities in Federal Law Enforcement*" delivered on October 7, 2002, at SMU, Dedman School of Law, Hillcrest and Daniel Ave., Dallas Texas, for SMU, Dedman School of Law. (no written or videotaped materials)

44. "*Dallas Police Department Rookie of the Year; A Tribute To Law Enforcement*", delivered on September 28, 2002 at the Crowne Plaza Hotel, Mockingbird Ln. and I-35, Dallas, Texas, for the Dallas Junior Chamber of Commerce. (a copy of the speech is attached)

45. "*Perspectives From A Woman in Law Enforcement*" delivered on September 18, 2002 at the Aristocrat Hotel, 1933 Main St., Dallas, Texas for Executive Women in Government, Dallas Chapter. (a copy of the outline for the speech is attached)

46. "*Aviation Security Post 9/11*" delivered on August 27, 2002 at Verizon Place, 2200 West Airfield Drive, DFW Airport, Dallas, Texas 752621, for the FBI's North Texas Regional Security Conference. (no written or videotaped materials)

47. "*United States Attorney's Initiatives*" delivered on August 21, 2002 at the Doubletree Hotel, North Central Expressway and Caruth Haven Rd., for the Women's Issues Network. (no written or videotaped materials)

48. "*United States Attorney's Initiatives*" delivered on June 15, 2002 at the Szechwan Pavilion, 8411 Preston Rd., Dallas, Texas for the Dallas Asian-American Bar Association. (no written or videotaped materials)

49. *"Reflections of a New United States Attorney"* delivered on June 28, 2002 at the Park Cities Club, 5956 Sherry Lane, Dallas, Texas, 75225 for the Women's Breakfast Club. (no written or videotaped materials)

50. *"United States Attorney's Initiatives"* delivered on May 22, 2002, at the Jewish Community Center, 7900 Northhaven Rd., Dallas, Texas 75230 for the Anti-defamation League. (no written or videotaped materials)

51. *"United States Attorney's Initiatives"* delivered on May 16, 2002, at the Renaissance Hotel, 2222 N. Stemmons Freeway, Dallas, Texas for The Greater Dallas Crime Commission.(a copy of an outline for the speech is attached)

52. *"United States Attorney's Initiatives"* delivered March 13, 2002 at the Cuidad Restaurant, 3888 Oaklawn Ave, Dallas, Texas, Ste. 135, Dallas, Texas 75201. (a copy of speech attached)

53. *"Judges' Panel on Patent Issues"* panel discussion delivered on November 1, 2001, at the Four Seasons Hotel, 98 San Jacinto Blvd., Austin, Texas 78705 for the 6th Annual Advanced Patent Law Institute sponsored by the University of Texas Continuing Legal Education Program.(no written or videotaped materials)

54. *"An Evening With the Judges"* a panel discussion delivered June 28, 2001, at the George Allen Courts Building, Central Jury Room, 600 Commerce, Dallas, Texas 75240, sponsored by St. Mary's School of Law, Continuing Legal Education Program.(no written or videotaped materials)

55. *"The Magistrate Judge's Role During a Criminal Investigation and the Relationship Between the Magistrate Judge and the Prosecutor/Police"* delivered August 29, 2000 at the Swissotel in Quito, Ecuador for a Department of Justice sponsored seminar for Ecuadorian judges on the country's new system of justice. (a copy of notes for the speech is attached)

56. *"Top Ten Discovery Problems In Federal Court"* delivered May 12, 2000, at the Dallas Division U.S. Attorney's Office, 1100 Commerce, 3rd floor, Dallas, Texas 75242 for the continuing legal education seminar at the U.S. Attorney's Office for the Northern District of Texas. (a copy of notes for the speech is attached)

57. *"Electronic Discovery"* delivered April 26, 2000, at the Fairmont Hotel, 1717 N. Akard, Dallas, Texas 75201 sponsored by the Texas General Counsel Forum. (a copy of the speech and an article covering the speech in the *Executive Lawyer* are attached).

58. *"Women in Government- a Historical Perspective"* delivered September 1999, at the City Club, 901 Main St., Dallas, Texas 75202, sponsored in Dallas, Texas to the Dallas Chapter of Executive Women in Government. (a copy of notes for the speech is attached)

59. "*Effective Presentation in the Courtroom*" delivered October 1, 1998, at the Petroleum Club in Dallas, Texas, to the Women's Network of Legal Professionals and sponsored by Price Waterhouse Coopers. (a copy of the speech is attached)

60. *"Legal Ethics- A Judicial Perspective"* a panel discussion delivered on July 25, 1998, at the Four Seasons Hotel at Las Colinas, Dallas, Texas, for the 2nd Annual Intellectual Property Law Conference for Women Corporate Counsel.(a copy of notes for the speech is attached)

61. "*Women in Law Enforcement*" delivered on March 12, 1998, at the South Central Regional Office of the Federal Bureau of Prisons, 4211 Cedar Springs Rd., Suite 300, Dallas, Texas to staffers of the Federal Bureau of Prisons in connections with "Womens' History Month."(a copy of notes for the speech is attached)

62. "*Overcoming the Odds-Women in Federal Law Enforcement*" delivered on September 18, 1997, at the City Club, 901 Main St., Dallas, Texas 75202, sponsored by Women in Federal Law Enforcement ("WIFLE")(a copy of notes for the speech is attached)

63. *Top Ten List of Effective and Ineffective Things Lawyers Do in Trial"* delivered September 5, 1997, at Sfuzzi Restaurant on McKinney Ave. in Dallas, Texas to William "Mac" Taylor Chapter of the American Inns of Court.(a copy of notes for the speech is attached)

64. "*My Faith-Balancing Work and Family*" delivered September 10, 1996, at the Park Cities Club in Dallas, Texas to the Professional Womens' Fellowship.(a copy of notes for the speech is attached)

65. "*Ethical Dilemmas-Balancing Home and Work*" delivered on December 6, 1994, at the Dallas Bar Association's headquarters, 2101 Ross Ave, Dallas, Texas 75242 to the St. Thomas More Catholic Lawyers Guild.(a copy of notes for the speech is attached)

13. Health: What is the present state of your health? List the date of your last physical examination.

I am in excellent health. My last physical examination was in July 2003.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

March 1990-April 2002:

United States Magistrate Judge, Northern District of Texas, Dallas Division, 1100 Commerce, Rm. 15C40 Dallas, Texas 75242:

I was appointed to the position of United States Magistrate Judge for an eight-year term on March 2, 1990 by the United State District Court for the Northern District of Texas. On March 2, 1998, I was appointed to a second eight-year term of which I served only four years due to my 2002 appointment to the position of United States Attorney. A United States magistrate judge is a judicial officer of the United States district court. The magistrate judges' role is to assist the United States district courts. The jurisdiction of magistrate judges is generally set forth in the Federal Magistrates Act of 1968, as amended (28 U.S.C.§ 636 et seq). Essentially, the authority a magistrate judge exercises is the jurisdiction of the district court itself, delegated to a magistrate judge by statute and by the district judges of the court. Magistrate judge's duties vary from district to district based on the needs of the district court in each district. As a magistrate judge in the Dallas Division of the Northern District of Texas, approximately ninety percent of my duties involved presiding over civil jury trials, bench trials, pretrial and post-trial hearings and ruling on motions covering a broad range of federal jurisdictional areas including: employment, civil rights, ERISA, patent, copyright, trademark, banking, securities, insurance, contract, tort and habeas actions. Approximately ten percent of my duties involved presiding over pretrial criminal matters which include issuing search and arrest warrants and presiding over initial appearances

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

All of the cases listed below are either officially reported or copies have been provided.

Ten most significant opinions:

1. *Vaughn v. Johnson,* No. 7:98-CV-005-R, 2001 WL 912657(N.D. Tex., Aug 07, 2001), *aff'd,* 46 Fed. Appx. 227, — F.3d —, 2002 WL 1940096 (5th Cir. (Tex.) Jul. 25 2002)(table), cert. denied, 123 S. Ct. 1251 (U.S. Feb. 24, 2003)(No. 02-7157)(copy attached).

2. *Equal Employment Opportunity Commission v. Exxon Corp.*, 124 F. Supp. 2d 987 (N.D. Tex. 2000).(no appeal was taken).

3. *U.S. v. Hughes*, 71 F. Supp.2d 605 (N.D.Tex. 1999), *rev'*d 230 F.3d 815 (5th Cir. 2000).

4. *Florence v. Runyon*, 990 F. Supp 2d 485 (N.D. Tex. 1997) opinion adopted, id. at 498 (Fitzwater, J.), *aff'd*, 208 F.3d 1006. (5th Cir.2000) (table) (per curiam).

5. *Delta Brands v. Wysong*, No. CA-3-CV-1935-BC, 1998 WL 641810 (N.D. Tex. 1998), *aff'd*, 203 F. 3d 828. (5th Cir. 1999)(table).

6. *Equal Employment Opportunity Commission v. Exxon Corp.*, 1 F. Supp.2d 635 (N.D. Tex. 1998), *rev'*d, 203 F.3d 871(5th Cir 2000).

7. *Swann v. City of Dallas*, 922 F. Supp. 1184 (N.D. Tex. 1996), *aff'd*, 131 F. 3d 140 (5th Cir. 1997)(table).

8. *Lahr v. Fulbright & Jaworski*, 164 F.R.D. 196 (N.D. Tex. 1995), *aff'd*, 164 F.R.D. 204 (N.D. Tex. 1996).

9. *Florence v. Frank*, , 774 F. Supp. 1054 (N.D. Tex. 1991)(no appeal was taken).

10. *Kadonsky v. U.S.*, No. CA-3:96-CV-2969-BC, 1998 WL 460293 (N.D. Tex. August 4, 1998), *aff'd*, 216 F.3d 499 (5th Cir. 2000).

<u>Citations and summaries for opinions that were reversed or criticized</u>:

1. *U.S. v. Hughes*, 71 F. Supp.2d 605 (N.D. Tex. 1999). The citation of the Fifth Circuit's opinion reversing the case can be found at *U.S. v. Hughes*, 230 F.3d 815 (5th Cir. 2000).

<u>Summary</u>: This was a criminal case in which the defendant, Ronald Hughes, was convicted in 1995 by a jury for various offenses arising out of a money-laundering scheme. His conviction was affirmed on appeal. He later filed a motion to vacate his sentence under 28 U.S.C. § 2255, claiming that after trial he learned that the lead government agent in the case had withheld exculpatory evidence from him. His motion was referred to me by the district court. I held an evidentiary hearing and agreed with the defendant that material evidence under *Brady v. Maryland*, 373 U.S. 83(1963), had been withheld from him. My opinion, cited above, detailed the reasons for my finding and recommended to the district court that Hughes conviction be vacated. The district agreed and ordered Hughes' conviction vacated. The government appealed and the Fifth Circuit reversed finding that the withheld evidence was not material under *Brady* standards.

2. *Riley v. Plan Administrator v. Administrator of Supersaver 401K Capital Accumulation Plan,* No. CA3:98-CV-2056-BC, 1999 WL 588292 (N.D. Tex. Aug. 5, 1999). The Fifth Circuit's opinion affirming the case can be found at *Riley v. Plan Administrator v. Administrator of Supersaver 401K Capital Accumulation Plan,* 209 F.3d 780 (5th Cir.2000).

Summary: An action under the Employee Retirement Income Security Act ("ERISA"), as amended, 29 U.S.C. §§ 1001 et seq. Both sides consented to my jurisdiction. The plaintiff claimed that the defendant, while administering an ERISA governed pension plan, failed to pay plaintiff benefits owed under the Plan and breached its fiduciary duty by failing to provide plaintiff with complete and accurate information about the Plan. The defendant moved for summary judgment. I granted the motion with respect to plaintiff's claims regarding breach of fiduciary duty and improper administration of the Plan but denied the defendants request for attorneys fees relying on one factor of a five factor test known as the *Bowen* factors. On appeal the Fifth Circuit affirmed my decision but criticized my reliance on only one of the *Bowen* factors holding that I should have addressed all five factors in my analysis.

3. *Equal Employment Opportunity Commission v. Exxon Corp.*, 1 F. Supp.2d 635 (N.D. Tex. 1998). The citation for the Fifth Circuit's opinion reversing the case can be found at *Equal Employment Opportunity Commission v. Exxon Corp.*, 203 F.3d 871 (5th Cir 2000).

Summary: This was an Americans With Disabilities Act ("ADA") case brought by the EEOC on behalf of rehabilitated alcohol and drug abusers who were denied positions in jobs designated "safety sensitive" by Exxon Corp. after the Exxon *Valdez* disaster. The plaintiffs claimed Exxon discriminated against them by excluding them from these safety sensitive jobs. This opinion addressed the EEOC's motion for summary judgment on certain of Exxon's affirmative defenses. Specifically, with respect to the EEOC's claim that Exxon's policy of excluding rehabilitated substance abusers violated the ADA, Exxon raised the affirmative defenses of "business necessity" and "judicial estoppel." In its motion for summary judgment, the EEOC argued that Exxon could not defend its policy as a business necessity but was relegated to the more stringent standard under the ADA of proving that the plaintiffs were a direct threat. The EEOC further argued that Exxon's judicial estoppel defense was not legally viable under the undisputed facts of the case. In this opinion, I recommended that the EEOC's motion for summary judgment be granted. The district court agreed and adopted my recommendation. On appeal the Fifth Circuit reversed holding that Exxon could defend its policy as a business necessity and was not required to establish that the plaintiffs posed a direct threat to the safety of others in order to justify its policy.

4. *Jackson v. Johnson*, No. , 1997 WL 528049 (August 15, 1997). The citation for the Fifth Circuit's opinion reversing the case can be found at *Jackson v. Johnston*, 150 F. 3d 520 (5th Cir. 1998).

Summary: This was a post-conviction application for a writ of habeas corpus by a Texas state prisoner who claimed he had received ineffective assistance of counsel on appeal when his counsel failed to include a videotape as part of the appeal record that was critical to the issue of State's identification of him as the individual involved in the drug crime underlying his conviction. The parties consented to my jurisdiction. I held that the application should be granted because the petitioner's appeal counsel's omission had prejudiced him on appeal. On appeal by the State, the Fifth Circuit reversed holding that the petitioner was not prejudiced by his counsel's failure to submit the videotape to the state appellate court.

5. *Lyn-Lea Travel Corp. v. American Airlines*, Inc., CA-3-96-CV-2068-BC, 1997 WL 33441244 (N.D. Tex. Dec. 2, 1997); 1999 WL 777716 (N.D. Tex Sept. 29, 1999); 2000 WL 1456448 (N.D. Tex. Sept 28, 2001). The citation for the Fifth Circuit's opinion affirming in part and reversing in part these three decisions in *Lyn-Lea Travel Corp. v. American Airlines, Inc.*,CA-3-96-CV-2068-BC, can be found at *Lyn-Lea Travel Corp. v. American Airlines*, Inc. 283 F.3d 282 (5th Cir.2002).

Summary: This case involved an action by a travel agency, Lyn-Lea Travel Corp, (Lyn-Lea) against American Airlines Inc. (American) based on allegations that American reduced the profitability of Lyn-Lea's travel agent booking contract with American. Essentially, Lyn-Lea alleged that at the time American negotiated the booking contract at issue that American knew it was about to reduce commissions paid to travel agencies and should have disclosed the impending changes to Lyn-Lea. Lyn-Lea's claims against American included tortious interference with business relationships, breach of contract, fraud and violations of the Texas Deceptive Trade Practices Act. American filed a counterclaim against Lyn-Lea alleging breach of contract. I granted summary judgment in favor of American on all of Lyn-Lea claims, finding insufficient evidence to support Lyn-Lea's breach of contract claim and that its remaining claims were preempted by the Airline Deregulation Act (ADA). In a subsequent order, I dismissed Lyn-Lea's affirmative defense of fraudulent inducement to American's breach of contract claim on the basis of ADA preemption. In another order, I sanctioned Lyn-Lea and its counsel for violating protective orders relating to confidential documents and recommended that they be held in contempt for these actions. The only claim remaining was American's counterclaim which the parties settled prior to trial. Thereafter, on American's motion, I awarded American $123,933.69 in attorney's fees and $30,000 contingent upon Lyn-Lea's unsuccessful appeal. On appeal, Lyn-Lea challenged, *inter alia*, the orders dismissing its claims and affirmative defense, the sanctions order and the attorney's fee award. The Fifth Circuit affirmed my decision that Lyn-Lea's state law claims were preempted by the ADA but reversed my finding that Lyn-Lea's affirmative defense of fraudulent inducement was preempted by the ADA and remanded my award of attorney's fees in light of its finding that Lyn-Lea's fraudulent inducement claim was not preempted under the ADA.

Citations to significant opinions on federal or state constitutional issues:

1. *U.S. v. Hughes*, 71 F. Supp.2d 605 (N.D. Tex. 1999), *rev'd*, 230 F.3d 815 (5th Cir. 2000).

2. *Swann v. City of Dallas*, 922 F. Supp. 1184 (N.D. Tex. 1996), *aff'd*, 131 F. 3d 140 (5th Cir. 1997).(table decision).

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

April 2002-present: **(Appointed by U.S. President George W. Bush)**
United States Attorney for the Northern District of Texas, 1100 Commerce, 3rd floor
Dallas, Texas 75242-1699:

February 1987-March 1990: **(Appointed by U.S. Attorney General Edwin Meese)**
Assistant United States Attorney
United States Attorney's Office, Northern District of Texas, Dallas Division 1100 Commerce, 3rd floor
Dallas, Texas 75242-1699:

June 1981-February 1987: **(Appointed by Dallas County District Attorney Henry Wade)**
Assistant District Attorney
Dallas County District Attorney's Office,
133 N. Industrial Blvd., LB 19
Dallas, Texas 75207-4399:

I have never run for elective office and have never failed to be appointed or confirmed to a appointed office.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I have never served as a law clerk to a judge.

2. whether you practiced alone, and if so, the addresses and dates;

I have not practiced alone.

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each;

April 2002-present:
United States Attorney, Northern District of Texas, 1100 Commerce, Rm. 15C40 Dallas, Texas 75242

March 1990-April 2002:
United States Magistrate Judge, Northern District of Texas, Dallas Division, 1100 Commerce, Rm. 15C40 Dallas, Texas 75242

February 1987-March 1990:
Assistant United States Attorney
United States Attorney's Office, Northern District of Texas, Dallas Division 1100 Commerce, 3rd floor Dallas, Texas 75242-1699

June 1981-February 1987:
Assistant District Attorney
Dallas County District Attorney's Office, 133 N. Industrial Blvd., LB 19 Dallas, Texas 75207-4399

b. 1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

United States Attorney's Office:

1987-1989: Criminal Section Attorney; duties included analyzing, investigating and presenting evidence

in federal criminal cases. While in the Criminal Section of the U.S. Attorney's Office, I tried six criminal cases to verdict before juries. In all but one of those cases I was lead counsel.

1989-1990: **Civil Section Attorney; duties included representing various federal agencies in civil actions federal court.**

2002-present: United States Attorney; duties include supervising and managing 90 attorneys and 80 support employees who work for the office. I am also responsible for overseeing the federal criminal and civil cases filed in the Northern District of Texas. This requires a knowledge of the substantive and procedural law applicable to these cases. The United States Attorney is also considered the chief federal law enforcement officer for the district responsible for coordinating with the various federal agencies on law enforcement issues, including terrorism, narcotics trafficking, immigration violations, corporate fraud, child exploitation and violent crime.

United States Magistrate Judge:

As mentioned in response to question No. 14, as a magistrate judge in the Dallas Division of the Northern District of Texas, approximately ninety percent of my duties involved presiding over civil jury trials, bench trials, pretrial and post-trial hearings and ruling on motions involving a broad range of federal jurisdiction areas including: employment, civil rights, ERISA, patent, copyright, trademark, banking, securities, insurance, contract, tort and habeas actions. Approximately ten percent of my duties involved presiding over pretrial criminal matters which include issuing search and arrest warrants and presiding over initial appearances

Dallas County District Attorney's Office:

1981-1985 **Misdemeanor and Felony Prosecutor; duties included representing the State of Texas in all types of misdemeanor and felony cases. Participated in 150 jury trials. Served as lead counsel in the majority of the 150 trials.**

1985-1987- Chief Felony Prosecutor, Major Commercial Fraud Section of the Specialized Crime Division; duties included analyzing, investigating and presenting evidence in white collar criminal cases, including securities and trade secret violations. In addition, as a chief prosecutor I supervised three attorneys and three investigators.

2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

At the District Attorney's Office and the United States Attorney's Office my clients consisted of crime victims, local police and federal law enforcement agencies.

c. 1. Did you appear in court frequently, occasionally, or not at all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Between 1981 and 1990, when I worked at the District Attorney's Office and the United States Attorney's Office, I appeared in court regularly. After my appointment as a United States Magistrate Judge in 1990 until my appointment as United States Attorney in 2002, all of my court appearances were in my role as a federal judicial officer. Between 1981 and 1990 I tried 156 jury trials in state and federal court. The actual number of cases I tried per year declined after I became the chief prosecutor in the Major Commercial Fraud Unit at the District Attorney's Office. This was due to the more complex nature of the cases I handled in that unit. The number of cases I tried per year further declined upon my employment as an Assistant United States Attorney. This was also due to the complexity of the criminal cases I prosecuted in federal court. As a federal prosecutor, however, my actual hours in court did not decline at all from previous years due to two lengthy criminal cases I tried between 1987 and 1989. I spent approximately 18 weeks in federal court on two criminal cases I tried between November 1987 and April 1989. In my present position as United States Attorney, I have been co-counsel for the government in one felony case scheduled for trial in which I engaged in extensive trial preparation. The defendant pled guilty on the eve of trial and I represented the government at the guilty plea proceedings. I also appeared in court for the sentencing hearing. At the sentencing hearing, I presented evidence and argued to the court on behalf of the government.

2. What percentage of these appearances was in:

(a) federal courts; **Between 1987 and 1990, and in 2003, while at the U.S. Attorney's Office, 100% of my court appearances were in federal court.**

(b) state courts of record; **Between 1981 and 1987, while I was at the District Attorney's Office, 100% of my court appearances were in state court.**

(c) other courts. **N/A**

3. What percentage of your litigation was:

(a) civil; **1989-100%**
2002-present: 25%

(b) criminal. **1981-1988: 100%**
1989-0%
2002-present: 75%

4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel.

Between 1981 and 1990 I tried 156 jury trials to verdict in state and federal court. Approximately 30 of those jury trials took place between 1981 and 1982 while I was assigned to the Misdemeanor Section of the District Attorney's Office. I do not have the break-down of my chief/associate role in the 30 jury trials and or any of the non-jury trials I tried as a misdemeanor prosecutor between June 1981 and June 1982. However, I can report that between July 1982 and February 1989, I tried 126 jury trials to verdict. In 74 of those cases, I was chief counsel. Between 1982 and 1989, I tried 27 non-jury trials to verdict. I was chief counsel in all 27 of those non-jury cases.

5. What percentage of these trials was:

(a) jury; **I tried 183 cases to verdict of those, 85% were decided by a jury.**

(b) non-jury. **15% of the 183 cases were non-jury trials.**

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your

participation in the litigation and the final disposition of the case. Also state as to each case:

(a) the date of representation;
(b) the name of the court and the name of the judge or judges before whom the case was litigated; and
(c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

1. **Case Name & Number**: United States v. George Dennis Berry, et al., 3:88-CR-157-G
Court: U. S. District Court, Northern District of Texas at Dallas, Judge A. Joe Fish presided.
Dates of litigation: 2/89-4/89
Case Summary: A large-scale drug and tax evasion conspiracy. The defendants were charged with conspiracy to distribute methamphetamine. This four-defendant jury trial lasted eight weeks and involved more than 100 witnesses and 500 exhibits
Role: As chief counsel for the government in this case, I supervised the investigation, prepared the case for grand jury review and for trial and presented a substantial portion of the evidence to the jury at trial.
Disposition: All four defendants were convicted on all counts. On appeal, the conviction of one defendant was reversed and another defendant's conviction was reversed as to one count.
Appeal Citation: United States v. Norris, et al., 910 F.2d 1246 (5th Cir.1990).
Significance: This case was significant due to the breadth of the investigation, the level of organization necessary to prepare for trial and the length of the trial.
Co-Counsel: Mr. Paul Macaluso, U.S. Attorney's Office, 1100 Commerce, 3rd floor, Dallas, TX. 75242, (214) 659-8600.
Opposing Counsel: For defendant Berry: Mr. Vic Feazell, present address and phone number unknown; for defendant Owens: Justice Kerry P. Fitzgerald, Dallas Fifth Court of Appeals, 600 Commerce, Ste. 200 Dallas, TX. 75202 (214) 712-3450; for defendant Darr: Mr. Carl D. Hughes, 2214 Main, St. Dallas, TX. 75201, (214) 761-9342; for defendant Norris: Mr. Thomas E. Kurth, present address and phone number unknown.

2. **Case Name & Number**: United States v. Carl Ray Helms, et al., 3-87-CR-163-G
Court: U. S. District Court, Northern District of Texas at Dallas, Judge A. Joe Fish presided.
Dates of litigation: 11/87-2/88
Case Summary: A massive mail-fraud prosecution, in which the defendants' scheme extended across the United States. The defendants were charged with selling cosmetic distributorships and then failing to follow through on their commitments to the purchasers. This eight-defendant jury trial took ten weeks to complete and included the testimony of 80 witnesses and the admission of more than 100 exhibits

Role: As chief counsel for the government in this case, I supervised the investigation, prepared the case for the grand jury and for trial and presented a substantial portion of the evidence to the jury at trial.
Disposition: The jury convicted six of the defendants and acquitted two defendants who performed minor roles in the scheme. The case was affirmed on appeal.
Appeal Citation: *United States v. Helms*, 897 F.2d 1293, 1298 (5th Cir.), *cert. denied*, 498 U.S. 900 (1990).
Significance: This case was significant due to the breadth of the investigation, the level of organization necessary to prepare for trial and the length of the trial. This case was also significant because the defendants, through multiple advance fee schemes defrauded more than 600 investors
Co-counsel: Mr. Jack C. Williamson (deceased)
Opposing Counsel: For defendant Helms: Mr. David Schick, 3838 Oak Lawn Ste. 400, Dallas, TX. 75219, (214) 965-9229; for defendant Dennis Harris: Mr. Steve Sumner, 3838 Oak Lawn Ste. 400, Dallas, TX. 75219, (214) 965-9229; for defendant Shirley Harris: Mr. Michael P. Gibson, 2414 Akard St., Dallas, TX. 75201 (214) 871-4900; for defendant Briggs: Mr. Vincent W. Perini, 5630 Yale Blvd., Dallas, TX. 75206, (214) 747-1134; for defendant Dunn: Mr. G.A. Lee Hight, Dallas County D.A.'s Office, 133 N. Industrial Blvd., LB # 19, Dallas, TX. 75207, (214) 653-3600; for defendant Vandervort: Mr. Samuel Foutz, present address and phone number unknown; for defendants Stout and Pike: Mr. James Clark, Ardmore, Okla., present address and phone number unknown.

3. **Case Name & Number**: United States v. Jonathan Logan, (district court case number unavailable)
Court: U. S. District Court, Northern District of Texas at Dallas, Judge Robert B. Maloney presided.(retired)
Dates of litigation: 7/87
Case Summary: An inmate housed in a federal correctional facility was charged with possession of heroin, cocaine and marijuana at the facility.
Role: As chief counsel for the government in this case, I supervised the investigation, prepared the case for grand jury review and for trial and presented all of the evidence to the jury at trial.
Disposition: The defendant was convicted by the jury. Shortly thereafter, the district court granted the defendant's motion for a new trial based on ineffective assistance of counsel. The government appealed the case to the Fifth Circuit. (The appeal was handled by an appellate attorney within the U.S. Attorney's Office). The Fifth Circuit reversed the district court's grant of a new trial and remanded the case with instructions to reinstate the jury's verdict.
Appeal Citation: *United States v. Logan*, 861 F.2d 859, 863 (5th Cir.1988)
Significance: This case was one of a few at the time in which the government appealed a district court's grant of a new trial. Additionally, this case was significant because the Fifth Circuit explained the standard for ordering a new trial based on a claim of ineffective assistance of counsel.

Co-counsel: None
Opposing Counsel: Mr. Larry Hance, Two Lincoln Center, Ste. 626, 5420 LBJ Fwy., Dallas, TX. 75240, (469) 374-9600

4. **Case Name & Number**: United States v. Elvis Ray Blankenship, Dolores Palmer and James King, 3-87-CR-46-T.
Court: U. S. District Court, Northern District of Texas at Dallas, Judge Robert B. Maloney presided.(retired)
Dates of litigation: 6/87
Case Summary: The defendants were involved in methamphetamine distribution.
Role: As chief counsel for the government in this case, I presented all of the evidence to the jury at trial and presented the closing argument.
Disposition: The defendants were convicted of the charges against them. I do not recall if they appealed the case.
Appeal Citation: I have no records to indicated the case was appealed.
Significance: This case was significant because it was my first federal jury trial and the evidence against the defendants was circumstantial.
Co-counsel: Mr. Robert Smith, 2828 Routh St., LB # 10, Dallas, TX. 75201, (214) 742-1201
Opposing Counsel: for defendant Elvis Ray Blankenship: Mr. George Milner, 2515 McKinney Ave, Dallas, TX. 75201, (214) 651-1121; for defendant Dolores Palmer: Mr. Larry Finstrom, 1401 Elm, Ste. 4770, Dallas, TX. 75202, (214) 748-5855; for James King: Mr. E.X. Martin, 8828 Greenville Ave., Dallas, TX. 75243, (214)343-7400.

5. **Case Name & Number**: State of Texas v. Thomas B. Schalk and Robert G. Leonard, F-85-98689
Court: Texas State Criminal District Court, Justice Ed Kinkeade presided.
Dates of litigation: 7/86-8/86
Case Summary: The defendants were former Texas Instruments' computer engineers with doctoral degrees who were indicted under the state's "theft of trade secrets" statute. They were specifically charged with copying computer programs involving computer voice recognition technology while they were employed by Texas Instruments.
Role: As associate counsel for the State of Texas in this case, I assisted in the pretrial preparation, conducted the jury selection, assisted the chief counsel during the trial and presented the opening portion of the closing argument.
Disposition: Both defendants were convicted of the charges against them. Their convictions were affirmed on appeal.
Appeal Citation: *Schalk v. State*, 767 S.W.2d 441, 454 (Tex.App.--Dallas 1988), *aff'd*, 823 S.W.2d 633 (Tex. Crim. App.1991), *cert. denied*, 503 U.S. 1006, 112 S.Ct. 1763, 118 L. Ed.2d 425 (1992); *Leonard v. State*, 767 S.W.2d 171, 175 (Tex.App.-Dallas 1988), *aff'd sub nom., Schalk v. State*, 823 S.W.2d 633 (Tex. Crim. App. 1991), *cert. denied*, 503 U.S. 1006, 112 S. Ct. 1763, 118 L. Ed.2d 425 (1992).

Significance: This case was the first in Dallas County in which defendants were tried on charges of stealing computer programs. The programs involved the highly competitive voice recognition technology which enables machines to understand and respond to human voice commands.
Co-counsel: Mr. Ted Steinke, 900 Jackson St., Dallas, TX. 75202, (214) 747-7148
Opposing Counsel: For defendant Leonard: Mr. Michael P. Carnes: 133 N. Industrial Blvd., LB 19, Dallas, TX. 75207-4399 (214) 653-3600; for defendant Schalk: Gerald Banks, present address and phone number unknown.

6. **Case Name & Number:** State of Texas v. Michael Thomas Wilson, F-84-92805
Court: The 195th Texas State Criminal District Court, a visiting judge presided (I do not recall or have access to his name).
Dates of litigation: 11/85
Case Summary: A securities fraud case in which the defendant sold fraudulent oil and gas leases.
Role: As chief counsel for the State of Texas in this case, I prepared the case for trial, presented the evidence to the jury and presented a portion of the closing argument.
Disposition: The defendant was convicted by the jury and assessed eighteen years in prison.
Appeal Citation: none
Significance: The defendant's scheme defrauded investors of thousands of dollars. His conviction availed the investors an opportunity to recoup a portion of their losses
Co-counsel: Mr. Ted Steinke, 900 Jackson St., Dallas, Texas 75202, (214) 747-7148
Opposing Counsel: Mr. John Barnett, present address and phone number unknown.

7. **Case Name & Number:** State of Texas v. Robert Ellis Campbell (I do not recall or have access to the case number)
Court: The 283rd Judicial District, Judge Jack Hampton presided.(retired)
Dates of litigation: 9/85
Case Summary: An aggravated sexual assault of a child in which the defendant was charged with forcing his young daughter to engage in sexual relations with him over a period of several years.
Role: As chief counsel for the State of Texas in this case, I prepared the case for trial, presented the evidence to the jury and presented a portion of the closing argument.
Disposition: The defendant was convicted by the jury and assessed a life sentence.
Appeal Citation: The case was affirmed in an unpublished opinion by the Fifth District Court of Appeals at Dallas. I do not have the case citation.
Significance: This was significant because it involved a retrial after the case had been reversed. By the time of the retrial, the defendant had convinced the victim, his daughter, not to testify against him. We were able to prevail in the case through cross-examination of his daughter and because of incriminating pictures the defendant had taken of himself and his daughter.
Co-counsel: Mr. Ted Steinke, 900 Jackson St., Dallas, Texas 75202, (214) 747-7148.

Opposing Counsel: Mr. Randall Worsham, 8300 Douglas, Dallas, Texas 75205, (214) 361-8891.

8. **Case Name & Number:** State of Texas v. Horace Virgil Crank (I do not recall or have access to the case number).
Court: Texas State Criminal District Court Number 3, Judge James B. Zimmerman presided.
Dates of litigation: 3/84
Case Summary: An aggravated robbery case in which the defendant robbed area banks with a makeshift bomb.
Role: As chief counsel for the State of Texas in this case, I prepared the case for trial, presented the evidence to the jury and presented a portion of the closing argument.
Disposition: The defendant was convicted by the jury and assessed a life sentence.
Appeal Citation: I do not have access to the appeal citation but I am aware that the case was affirmed on appeal.
Significance: This was a high profile case because the defendant was a local night club musician who led a clandestine life as a bank robber.
Co-counsel: I do not recall
Opposing Counsel: Mr. John Lubben, 2612 Boll St., Dallas, TX. 75204, (214) 720-9050.

9. **Case Name and Number:** State of Texas v. Thomas Paul Simanek
Court: Texas State Criminal District Court Number 2, Judge Don Metcalfe presided.
Dates of litigation: 1/84
Case Summary: A murder case in which the defendant killed his wife in Texas and then transported the body in the trunk of his car to Wisconsin for burial to conceal his crime.
Role: As chief counsel for the State of Texas in this case, I prepared the case for trial, presented
Disposition: The defendant was convicted of voluntary manslaughter by the jury and assessed a twenty-year sentence.
Appeal Citation: none
Significance: This was a somewhat high profile case because of the defendant's unusual actions following the murder.
Co-counsel: Mr. Chris Stokes, U.S. Attorney's Office, 1100 Commerce, 3rd Floor, Dallas, TX. 75242, (214) 659-8600.
Opposing Counsel: Ms. Colleen Dunbar, 1602 Cedar Springs Rd., Dallas, TX. 75202, (214) 220-2822.

10. **Case Name and Number:** State of Texas v. Gregory Don Washington, (I do not recall or have access to the case number).
Court: The 283rd Judicial District, Judge Jack Hampton presided (retired).
Dates of litigation: 2/83
Case Summary: An aggravated robbery case in which the victim, a sixty year-old woman, sustained severe bodily injury after being beaten by the defendant.

Role: As chief counsel for the State of Texas in this case, I prepared the case for trial, presented the evidence to the jury and presented a portion of the closing argument.
Disposition: The defendant was convicted by the jury and assessed a sixty-year sentence.
Appeal Citation: *Washington v. State*, 677 S.W.2d 142, 145 (Tex. App.-Dallas 1984, no pet.).
Significance: This was a difficult case because the victim had been so badly beaten she could not identify the defendant. We were able to utilize the testimony of the defendant's accomplice as well as circumstantial evidence to convict the defendant.
Co-counsel: I do not recall
Opposing Counsel: I do not recall.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege. (unless the privilege has been waived.)

In addition to the opinions and litigated matters described in my responses to questions numbered 15, 17 and 18, above, I have recently pursued other significant legal activities. Specifically, in my role as United States Attorney for the Northern District of Texas, I have spearheaded our District's "Project Safe Neighborhoods" initiative. "Project Safe Neighborhoods" or "PSN" is a nationwide anti-gun crime initiative designed to make our nation's crime-ridden neighborhood's safer through effective law enforcement strategies and community outreach programs. The success of each district's PSN program hinges heavily upon the commitment of local law enforcement and community groups to join in a partnership with the United States Attorney's Office and the Bureau of Alcohol, Tobacco and Firearms (ATF). Through the hard work and dedication of several individuals in my office and the ATF, we have been able to forge a very successful partnership with these groups to combat gun crime in some of our most violent neighborhoods. Last May, our PSN law enforcement team dismantled a violent crack-dealing street gang that was terrorizing a neighborhood in the Pleasant Grove area of Dallas. According to Dallas Police Department statistics, the crime rate in the vicinity of this gang's activities dropped 60% after the May arrests. The success of our PSN program has prompted interim Dallas Police Chief Randy Hampton to expand the program to several other high-crime neighborhoods.

Another significant legal activity in which I have been involved as United States Attorney is the restructuring of the Northern District of Texas' Anti-Terrorism Task Force (ATTF). My office, in cooperation with the FBI and the United States Attorney's Office for the Eastern District of Texas, has expanded and strengthened our District's ability to prevent, disrupt and respond to terrorist activity by combining law enforcement and first responder resources from the Northern and Eastern districts of

Texas. In quarterly meetings, which include top level executives (ie. police chiefs, sheriffs, special agents in charge) from federal, state and local law enforcement entities, we share information, discuss cases under investigation and determine resource and training needs. Our restructured ATTF has enabled heads of federal, state and local agencies from the Northern and Eastern Districts of Texas to receive vital information regarding terrorist activity on a first-hand basis rather than through a representative assigned to work at the FBI. The new structure has also enhanced communication and cooperation between agencies which, in turn, has fortified our ability to fight terrorists.

As United States Attorney, I also enhanced our District's securities fraud task force and created a bankruptcy fraud task force. The securities fraud task force was restructured for the purpose of carrying out President Bush's initiative against corporate fraud. The task force, which meets quarterly, is composed of members from the United States Attorney's Office, the SEC, the FBI and the Texas State Securities Board. The purpose of the Northern District of Texas' Securities Fraud Task Force is to ensure that all potential cases involving corporate fraud and securities fraud are screened, analyzed and prosecuted if sufficient evidence exists to proceed. Our Bankruptcy Fraud Task Force serves the same purpose with respect to bankruptcy fraud cases. The Bankruptcy Fraud Task Force is made up of individuals from the United States Attorney's Office, the FBI, the IRS and the United States Trustee's Office.

II. FINANCIAL DATA AND CONFLICT OF INTEREST (PUBLIC)

1. List sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Please describe the arrangements you have made to be compensated in the future for any financial or business interest.

Pursuant to my involvement in the Federal Thrift Savings Plan since 1987, I expect derive the benefits of that account upon my retirement.

As a United States Magistrate Judge for twelve years serving under the Judicial Retirement System, I am eligible to receive an annuity at age 65. I do not know whether this annuity will be affected by my return to judicial service as a district judge, if confirmed.

2. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern. Identify the categories of litigation and financial arrangements that are likely to present

potential conflicts-of-interest during your initial service in the position to which you have been nominated.

In the event of a potential conflict of interest, I will comply fully with 28 U.S.C § 455. I will also consult with the ethics attorneys at the Office of General Counsel at the Administrative Office of the United States Courts as I did on a regular basis when I served as a United States Magistrate Judge. Additionally, I will work with the local U.S. District Clerk's Office to set up procedures to identify cases that may present a conflict of interest and to ensure that these cases are not filed in my court.

I am not aware of any financial arrangements that are likely to present a conflict of interest during my initial service. The only categories of litigation that will present a conflict of interest would be those civil and criminal cases pending in the United States Attorney's Office at any time during my tenure. I plan to recuse myself from all such cases and any others that might present even the appearance of a conflict of interest.

3. Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

No

4. List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, patents, honoraria, and other items exceeding $500 or more (If you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here.)

See Financial Disclosure Report, attached

5. Please complete the attached financial net worth statement in detail (Add schedules as called for).

See attached financial net worth statement and schedules

6. Have you ever held a position or played a role in a political campaign? If so, please identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities.

Yes, I have been involved in political campaigns, the requested details are set forth below.

Political Campaign Participation:

February-March 1976-

As a member of the Young Republicans at the University of Texas at Austin, I worked on the presidential primary campaign of Ronald Reagan. I worked at the phone banks and distributed flyers and yard signs.

September-November 1976-

As a member of the Young Republicans at the University of Texas at Austin, I worked on the presidential campaign for Gerald Ford. I worked at the phone banks and distributed flyers and yard signs.

March-November 1982-

I worked on the re-election campaign of my employer, Dallas County District Attorney Henry Wade. I worked at the phone banks and distributed flyers and yard signs.

July-September 1984-

I worked on the senatorial campaign of Senator Phil Gramm. My family and I worked the phone banks, stuffed envelopes and distributed flyers.

August 1984-

I supervised a group of volunteers at the 1984 Republican National Convention in Dallas, Texas. We assisted in checking delegates' credentials.

November 1986-

I worked on the campaign of Republican John Vance for Dallas County District Attorney.

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

While I have not represented the disadvantaged in court due to ethical constraints as a United States Attorney, United States Magistrate Judge and formerly as a state and federal prosecutor, I have been involved in other types of efforts to help the poor in court. Those efforts are described below:

In 1993 and 1994 I assisted Chief Judge Jerry Buchmeyer in revamping our court's panel of private attorneys who represent indigent defendants in federal criminal cases. This process took over a year and resulted in a highly qualified panel of attorneys for federal criminal appointments and improved the quality of justice in our federal criminal cases.

In 1995 I helped organize a panel of volunteer attorneys who were willing to assist pro se litigants in civil rights cases in federal court. Between 1995 and 1998 I served as a liaison between the panel and the court administrator.

In 2000 and 2001 I served as Vice-Chair (2000) and Co-Chair (2001) of the Dallas Bar Association's Pro Bono Activities Committee. As an officer of this committee, I am required to attend monthly meetings as well as participate in programs designed to encourage lawyer participation in providing legal services to the poor. This year I was in charge of our committee's "New Lawyers Reception." In that capacity, I devoted several hours to preparing for this event which is geared toward encouraging newer lawyers to become involved in pro bono legal work. My duties have included locating speakers and sending mailings to lawyers, judges and pro bono agencies and serving as master of ceremonies for the event.

In 2002, I served took part in the planning and served as moderator for an event titled "Dallas Bar Association's First Annual Pro Bono Summit." The summit brought judges, pro bono legal services providers, volunteer agencies and law firm pro bono coordinators from Dallas together for a strategy session on how to increase and improve legal services to the poor.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates -- through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What you have done to try to change these policies?

N/A

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Yes, Senators Kay Bailey Hutchison and former Senator Phil Gramm commissioned a selection committee for U.S. District Court and U.S. Attorney positions in Texas. Senator Gramm's successor, Senator John Cornyn and Senator Hutchison now oversee the selection committee. In 2001, I was interviewed by the selection committee when I applied for a U.S. District Court opening in the Northern District of Texas. There were approximately thirty members of the Committee present who interviewed me for thirty minutes about the judgeship. After the interviews, I was notified by a representative of the senators' offices that the Committee had selected me and three other applicants for personal interviews with both senators. Those interviews took place in July 2001. In August 2001 I was notified by Senator Gramm's office that another individual had been selected by the senators for the U.S. District Court opening in the Northern District of Texas.

In early September 2003, one of the district judges here in Dallas, Judge Jerry Buchmeyer, took senior status. Shortly thereafter, on September 8, 2003, Senators Hutchison and Cornyn contacted me and offered to recommend me to the President and U.S. Senate as Judge Buchmeyer's successor. I accepted their offer. I have completed and submitted the requisite forms including the Questionnaire for National Security Positions (Standard Forms 86), Supplement to Standard Form 86, a tax waiver form, fingerprint cards, White House Waiver Form, White House Personal Data Statement, the Senate Questionnaire and the Financial Disclosure Report.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue,or question? If so, please explain fully.

No

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped-many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

c. A tendency by the judiciary to impose broad, affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

The proper role of the judicial branch of our government is to interpret and apply the laws enacted by the legislative branch in the manner intended by the legislature and, where necessary, to interpret the constitutionality of the laws giving full consideration to the statutory text. An Article III judge should approach judicial review with appropriate judicial restraint and interpret laws as our lawmakers intend. Judicial restraint exercised in this manner adheres to the essential principle of our democratic government; the people's right to self-govern..

Another important principle related to the concept of judicial restraint is the doctrine of stare decisis. The doctrine of stare decisis or "to stand by decided matters" is critical to a fair justice system. Litigants have a right to expect certainty and stability in the administration of justice by our courts. Public faith in the judiciary depends upon its

ability predict and rely upon decisions by our courts. Adherence to precedent by our courts is, therefore, fundamental to maintaining our fair justice system.

AO-10
Rev. 1/2002

FINANCIAL DISCLOSURE REPORT
FOR CALENDAR YEAR 2002

Report Required by the Ethics in Government Act of 1978, (5 U.S.C. App., §§101-111)

1. Person Reporting *(Last name, first, middle initial)*	2. Court or Organization	3. Date of Report
Boyle, Jane J	District Court Northern District of Texas	
4. Title *(Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)* District Judge- Nominee	**5. ReportType (check appropriate type)** __X_ Nomination, Date __10/07/2003 ___ Initial ___ Annual ___ Final	**6. Reporting Period** 01/01/2002-10/31/2003
7. Chambers or Office Address 1100 Commerce, 3rd Floor Dallas, Texas 75242	**8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.** **Reviewing Officer** _____ **Date**_____	

IMPORTANT NOTES: The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.

I. POSITIONS. *(Reporting individual only; see pp. 9-13 of Instructions.)*

	POSITION	NAME OF ORGANIZATION/ENTITY
☐	**NONE** (No reportable positions.)	
1	Steering Committee Member	Safe City USA, Ft. Worth, Texas
2	Co-chair	Dallas Alliance on Underage Drinking
3	Commissioner	Family Violence Prevention Council (Additional position continues)

II. AGREEMENTS. *(Reporting individual only; see pp. 14-16 of Instructions.)*

	DATE	PARTIES AND TERMS
☐		**NONE** (No reportable agreements.)
1		Dallas Police and Fire Pension at age 50
2		
3		

III. NON-INVESTMENT INCOME. *(Reporting individual and spouse; see pp. 17-24 of Instructions.)*

	DATE	SOURCE AND TYPE	GROSS INCOME
☐		**NONE** (No reportable non-investment income.)	
1	2002-2003	Private Law Practice, sole practitioner	$
2	8/2003	Eastfield College, (teaching fall semester course)	$
3			$
4			$

5			$

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Jane J. Boyle	10/07/2003

IV. REIMBURSEMENTS – transportation, lodging, food, entertainment.
(Includes those to spouse and dependent children. See pp. 25-27 of Instructions.)

	SOURCE	DESCRIPTION
☐	NONE (No such reportable reimbursements.)	
1	Exempt	
2		
3		
4		
5		
6		
7		

V. GIFTS. *(Includes those to spouse and dependent children. See pp. 28-31 of Instructions.)*

	SOURCE	DESCRIPTION	VALUE
☐	NONE (No such reportable gifts.)		
1	Exempt		$
2			$
3			$
4			$

VI. LIABILITIES. *(Includes those of spouse and dependent children See pp. 32-33 of Instructions.)*

	CREDITOR	DESCRIPTION CODE*	VALUE
☐	NONE (No reportable liabilities.)		
1	Texas Federal Credit Union	Personal Loan	J
2	Citibank Visa	Credit Card debt	J
3	Providian Visa	Credit card debt	K
4	North Dallas Bank and Trust*	Bank loan	J
5			

6

*Value Codes:	J=$15,000 or less	K=$15,001-$50,000	L=$50,001-$100,000	M=$100,001-$250,000	N=$250,001-$500,000
	O=$500,001-$1,000,000	P1=$1,000,001-$5,000,000		P2=$5,000,001-$25,000,000	
	P3=$25,000,001-$50,000,000	P4=$50,000,001 or more			

FINANCIAL DISCLOSURE REPORT

Name of Person Reporting	Date of Report
Jane J Boyle	

VII. Page 1 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code3 (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	D. If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets,									
1 North Dallas Bank and Trust	A	Int.	J	T					
2 People's Federal Savings bank	B	Int.			Exempt				
3 Fidelity Investment "Blue Chip"	A	Div.	K	T					
4 U.S. Govt. EE series Savings bonds	None	Int.	J	T					
5 Dallas Police & Fire Pension	E	Pension	K	T					
6 Compass Bank, Dallas TX	A	Int.	J	T					
7 Bank of America	A	Savings	J	T					
8 Bank of America	A	Int.	J	T					
9									
10									
11									
12									
13									
14									

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001- $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting: Jane J. Boyle	Date of Report: 10/07/2003

VII. Page 5 INVESTMENTS and TRUSTS -- income, value, transactions *(Includes those of spouse and dependent children. See pp. 34-57 of Instructions.)*

A. Description of Assets (including trust assets) *Place "(X)" after each asset exempt from prior disclosure.*	B. Income during reporting period (1) Amt. Code1 (A-H)	B. (2) Type (e.g., div., rent or int.)	C. Gross value at end of reporting period (1) Value Code2 (J-P)	C. (2) Value Method Code (Q-W)	D. Transactions during reporting period (1) Type (e.g., buy, sell, merger, redemption)	If not exempt from disclosure (2) Date: Month-Day	(3) Value Code2 (J-P)	(4) Gain Code1 (A-H)	(5) Identity of buyer/seller (if private transaction)
☐ **NONE** (No reportable income, assets, or transactions)									
69									
70									

1	Income/Gain Codes: (See Col. B1, D4)	A=$1,000 or less F=$50,001- $100,000	B=$1,001-$2,500 G=$100,001-$1,000,000	C=$2,501-$5,000 H1=$1,000,001-$5,000,000	D=$5,001-$15,000 H2=More than $5,000,000	E=$15,001-$50,000
2	Value Codes: (See Col. C1, D3)	J=$15,000 or less N=$250,001-$500,000 P3=$25,000,001-$50,000,000	K=$15,001-$50,000 O=$500,001-$1,000,000	L=$50,001- $100,000 P1=$1,000,001-$5,000,000 P4=More than $50,000,000	M=$100,001-$250,000 P2=$5,000,001-$25,000,000	
3	Value Method Codes: (See Col. C2)	Q=Appraisal U=Book value	R=Cost (real estate only) V=Other	S=Assessment W=Estimated	T=Cash/Market	

FINANCIAL DISCLOSURE REPORT	Name of Person Reporting	Date of Report
	Jane J. Boyle	10/07/2003

VIII. ADDITIONAL INFORMATION OR EXPLANATIONS (Indicate part of Report.)

I. Positions:

Date	Position	Name of Organization
Jan-2001 to Dec. 2001	Vice-Chair	Dallas Bar Association, Business Litigation Section
Jan. 2001 to Dec. 2001	Co-Chair	Dallas Bar Association, Pro Bono Activities committee
Dec. 1988 to 2002	Trustee	Dallas Bar Foundation

IX. CERTIFICATION.

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app., § 501 et. seq., 5 U.S.C. § 7353 and Judicial Conference regulations.

Signature Jane J. Boyle Date Dec. 2, 2003

NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. App., § 104.)

FILING INSTRUCTIONS:

Mail signed original and 3 additional copies to:

Committee on Financial Disclosure
Administrative Office of the
United States Courts
Suite 2-301
One Columbus Circle, N.E.
Washington, D.C. 20544

FINANCIAL STATEMENT

NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks	$15,300.	0	0	Notes payable to banks-secured	N/A		
U.S. Government securities-add schedule	$7225.	0	0	Notes payable to banks-unsecured	N/A		
Listed securities-add schedule	$31,000.	0	0	Notes payable to relatives	N/A		
Unlisted securities--add schedule	N/A			Notes payable to others	N/A		
Accounts and notes receivable:	$6,000.	0	0	Accounts and bills due	$51,205.	0	0
Due from relatives and friends	N/A			Unpaid income tax	N/A		
Due from others	N/A			Other unpaid income and interest			
Doubtful	N/A			Real estate mortgages payable-add schedule	$297,500.	0	0
Real estate owned-add schedule	$417,310.	0	0	Chattel mortgages and other liens payable			
Real estate mortgages receivable	N/A			Other debts-itemize:			
Autos and other personal property	$6,000.	0	0				
Cash value-life insurance							
Other assets itemize:							
Pension, federal government Thrift savings plan							
	$50,467.	0	0				
(S) Dallas Police & Fire Pension (Present value(	$46,000.	0	0	Total liabilities	$348,705.	0	0

				Net Worth	$248,597.			
Total Assets	$597,302.	0	0	Total liabilities and net worth	$597,302.	0	0	
CONTINGENT LIABILITIES				GENERAL INFORMATION				
As endorser, comaker or guarantor	N/A			Are any assets pledged? (Add schedule)	N/A			
On leases or contracts	N/A			Are you defendant in any suits or legal actions?	N/A			
Legal Claims	N/A			Have you ever taken bankruptcy?	N/A			
Provision for Federal Income Tax	N/A							
Other special debt	N/A							

Jane J. Boyle **SCHEDULE OF ASSETS** **Page 1 of 2**

A. Cash on hand and in banks:

Institution:	Amount:
1. North Dallas Bank & Trust, Dallas, Texas	$ 2000.00
2. (S) Bank of America, Dallas, Texas	$ 2000.00
3. (S) Bank of America, Dallas, Texas	$ 2000.00
4. (S) Bank of America, Dallas, Texas (IOLTA)	$ 100.00
5 (S) Bank of America, Dallas, Texas (savings)	$ 8300.00
4. Texas Federal Credit Union, Dallas, Texas	$ 900.00
TOTAL	**$ 15,300.00**

B. U.S. Government Securities:

1. (DC) U.S. Government Series EE Savings Bonds	$ 7225.00
TOTAL	**$ 7225.00**

C. Listed Securities:

1. (DC) Fidelity Investments "Blue Chip" Fund	$ 31, 000.00
TOTAL	**$ 31, 000.00**

D. Unlisted Securities:

None	
TOTAL	**$ 0.00**

E. Accounts and notes receivable:

1. (S) Private law practice of spouse, receivables due from clients	$ 6,000.00
TOTAL	**$ 6,000.00**

Jane J. Boyle **SCHEDULE OF LIABILITIES** **(Continued)**
Page 2 of 2

	Amount
F. Unpaid income tax:	
None	
TOTAL	**$ 0.00**
G. Other unpaid tax and interest	
None	
TOTAL	**$ 0.00**
H. Real estate mortgages payable:	
Wells Fargo Home Mortgage Inc., mortgage on primary residence	**$ 297, 500.00**
TOTAL	**$ 297, 500.00**
J. Chattel Mortgages and other liens payable	
None	
TOTAL	**$ 0.00**
K. Other debts	
None	
TOTAL	**$ 0.00**
TOTAL LIABILITIES	**$ 348, 705.00**

Jane J. Boyle **SCHEDULE OF PLEDGED ASSETS** **Page 1 of 1**

Asset	Pledged To
1. Primary residence, value $ 417, 310.00	Wells Fargo Home Mortgage Inc., on $ 297, 500.00 loan on primary residence

Senator CORNYN. Thank you very much.

Of course, each of you have been through some investigation and background check before you had gotten here today, so this is not meant to be a reiteration of that, but I know Senator Leahy and I will probably have a few questions for each of you.

Let me just start with Mr. Hall, and ask each of you to comment on this. I know we frequently hear reference to judicial activism in the media and sometimes I wonder if we all mean the same thing when we talk about judicial activism, but I think what most people mean, whether they approach it from the left or the right, is a judge who takes some liberty with either a statute or precedents that state what the common law is, or with a constitutional interpretation and an attempt to perhaps pursue some agenda other than faithfully interpreting the law.

I wonder if, starting with you, Mr. Hall, if you could comment on that and what you consider to be illegitimate judicial law making from the bench.

Mr. HALL. Thank you, Mr. Chairman. That is obviously an important issue as one considers and hopes that one will become a judge, a Federal judge. If I may, let me answer by way of giving you my philosophy on that, and that really is that it is up to Congress essentially to pass the laws of this country. It is up to the Supreme Court of the United States ultimately to interpret the Constitution and to provide final interpretation on the laws.

It would be my intention as a judge, if I am confirmed, to follow the laws as closely as I could to divine Congress's intention from the written text of those laws and from the legislative history if there were a question around them, and to be bound by those laws and to be bound by the interpretation of the U.S. Supreme Court.

Senator CORNYN. I noticed you used the word "divine" and that may be an appropriate word in some instances, to try to figure out what Congress did mean by a statute, not always an easy task.

Mr. Kelley, would you care to comment, please?

Mr. KELLEY. I concur with everything my colleague just said I would add from the perspective of a District Court Judge, the constraints within which we operate would be even more narrow than those that an Appeals Court Judge would operate. Again, looking at it from the practical, trying to get the cases moved and get them done right in a manner that is fair to the litigants, if you end up taking a judicial activist view, one that seeks to achieve present results as opposed to following the law, you are going to end up with a wide variety of decisions on very similar facts which is going to have the effect of encouraging more litigation because it destroys the notions of predictability upon which our legal system is based. So from a would-be District Court Judge perspective, precedent and stare decisis, and the words that Congress have used are really everything that we need in our jobs.

Senator CORNYN. I certainly agree with you that predictability is a very important function of the rule of law, so people know what the rules are and can order their personal and business and other affairs accordingly. If they do not like the way the law is, then certainly we in this country recognize the right of every citizen to petition for a change of that law, and to work to see the law changed. So thank you for those comments.

Judge Cooke, would you care to comment on that issue?

Judge COOKE. Thank you, Senator. I support my colleagues in that. I think that it is important for a judge, a United States District Judge, to follow precedent and stare decisis, and if confirmed, I plan to do that. I plan to respect the three branches of Government and to respect the role that a United States District Court Judge should play, and that is to decide the matter before him or her, and to proceed from well-recognized stare decisis and precedent.

Senator CORNYN. Thank you very much.

Ms. Boyle.

Ms. BOYLE. Senator Cornyn, I think that my colleagues have stated very eloquently my views on the issue of judicial activism. Just to say that it is a basic premise of our Founding Fathers and the whole idea of separation of powers as the Judicial Branch interprets the law, and that is what we do. We do not make the law.

Senator CORNYN. Thank you, Ms. Boyle. Your comments remind me of something I have learned since I have come here to the Senate, that is, the saying that everything has been said but not everyone has said it yet.

[Laughter.]

Senator CORNYN. Which seems to be a commonly observed proposition here in Congress. But in all seriousness, thanks to each of you for your answers, and I will be glad to recognize Senator Leahy for any questions he may have at this time.

Senator LEAHY. Thank you, Mr. Chairman. I might say, in the time that Senator Cornyn has been here, he has obviously learned all about the right of unlimited debate in the Senate, when you have 100 who want to say something.

I ask this question both of Mr. Hall and Ms. Boyle. Obviously, in Vermont, between the papers of the various cases or at least a lot of the cases that go through the U.S. Attorney's Office, and I realize there are a lot of prosecutors there, but you are responsible for all of the cases being brought or dismissed or prosecuted.

It has been in my experience as a prosecutor that if somebody gets convicted and gets any period of time, you know they are going to appeal if they possibly can. Some of those appeals will circulate up to the Second Circuit. If you are confirmed, what would be your practice if a case came to the Second Circuit that had been in the U.S. Attorney's Office when you were there, even if you were not the attorney handling that particular case?

Mr. HALL. I would recuse myself, Senator. That is an excellent question. It is certainly a matter that I have thought about and that I have had to think about as I transitioned from private practice to becoming United States Attorney. But I think Section 455 of Title 28, if I am recalling the section correctly, quite clearly would mandate that I be recused—that I recuse myself from any matter that had been in the office while I was there. And as head of the office, it is really assumed under the Code of Professional Responsibility, that I have knowledge of that case, so that is my answer.

Senator LEAHY. I would expect in the Second Circuit, considering the jurisdiction of all of New York State and Connecticut, as well

as Vermont, that the Chief Judge would probably be able to find enough other cases to assign to than just those from Vermont.

Ms. Boyle, let me ask the same question. A case you have been involved as a prosecutor, is now, for whatever reason, now percolating to the District Court. What do you do?

Ms. BOYLE. Absolutely, Senator, and I really appreciate the question because I think the issue of fairness—both fairness and fact and the appearance of fairness is crucially and critically important to a sound judiciary.

What I would do—and I have thought about this ahead of time, is I do not plan to be involved in any cases that were in any way in my office, either as an investigative matter or as an indicted matter once I am on the bench. So I will talk to the Clerk of Court, as well as the General Counsel's Office at the Administrative Office of U.S. Courts for guidance on how we determine and ferret those out as to which ones they are. But I would not preside over any case that was in the office in any capacity since I have been U.S. Attorney.

Senator LEAHY. Thank you.

Judge Cooke, you have seen—I am not asking you for a listing of it—but you have seen good judges and bad judges in your career. And I am going to ask the same question of Mr. Kelley. The glories of our system, and also it can be a real problem in our system of Federal judges, is the lifetime tenure. Obviously, the Founders wanted to give as much independence as possible. I happen to agree with that. But I have seen judges who take on themselves the idea that now they are so much different than the rest of the world, and they will take it out on lawyers. They will treat lawyers in such a way. The question has often been asked, I mean it is a question of judicial temperament, something that we normally see. What is your view? You are going to have plaintiffs, defendants, rich, poor, every other kind coming in. Are you prepared from your past experience at all to keep telling yourself, okay, we have to be even-handed on this?

Judge COOKE. Thank you, Senator Leahy, that is a very important question. Yes, that is, if confirmed, what I plan to do. I think it is important to remember that every person that approaches the bar in any capacity is a person that should be treated politely, courteously, and always with respect.

Senator LEAHY. Professor Kelley, in your work you have been in and out of courts enough you know what I am saying about the, "Oh, my God, not him or her as a judge," as compared to, "We are going to get a fair shake here."

Mr. KELLEY. Through 23 years of private practice, I have been on the receiving end.

Senator LEAHY. Of the "Oh, my God, not him."

Mr. KELLEY. Of an imperious judge here or there, so I understand well what you are saying. One of the things about those kinds of experiences is the effect to me that it has on the litigants. We lawyers are somewhat hardened to it. You know, it is just another day at the battle, and some days you get the bear and some days the bear gets you.

To the litigant whose case it is, to encounter a judge who comes into a hearing or a trial with his mind made up, and acts in an

imperious fashion that does not allow people really the opportunity to state their case, is very destructive of the public respect for the judicial system, and while not everyone ends up in Federal Court, people who do have friends. They talk at the neighborhood picnic, and pretty soon there is a notion that somehow the game is rigged and you are not really able to say your case.

One of the most important things to me is not only being courteous, but having the patience to allow people to state their position. Whether you ultimately agree or disagree with that position, if the litigants feel like they have had their day in court, they will respect to result that comes out of it.

Senator LEAHY. Thank you. What you say about the litigants, this may be their one time ever in the court. We have to remind ourselves of that here in the Senate. We sort of take it for granted. You come in, park your car and go up to your office and get on with the day, and walk by the monuments and go into the hearings and all, and it is sometimes probably more routine than it should be, but I am brought up short every so often when I have somebody, a constituent from home, never been here before, and what they thought about it in seeing it, or somebody who is testifying before a Committee for just a few minutes, and this is a major event in their life, and may be one of 20 we will see that day. You have to stop and remind yourself that we do have a responsibility.

Our Federal Courts—and I will stop with this, Mr. Chairman, I do not mean to give everybody a lecture—but our Federal Courts, their independence, their standards, the fact that we see people of the quality of the four of you, this is something, this is a glory in our country that we have this, and we have to constantly, all of us, do our best for this.

I say to the families and friends who are here with all of you, you should be very proud to have this opportunity.

And with that, because some of you may want to go other places, Mr. Chairman, I will stop, and thank you very much.

Senator CORNYN. Thank you, Senator Leahy for those questions, and thanks to each of you for your comments.

I am tempted to philosophize some about the role about the Federal Judiciary, but in the interest of time, I will not.

I will just tell you that each of these very bright young men and women who sit behind us, help us go through each of your records, and we have excellent staff. So please do not assume because we are not asking you by cross-examining you or grilling you today, that we are not very interested in your record and your attitude and your thoughts about how you will perform on the Federal Bench, because I agree with Senator Leahy. Once you get on the Federal Bench, you are virtually untouchable, some would say unaccountable, but I would say even untouchable. But I appreciate the comments that you made, Mr. Kelley, and others about your responsibility because even though as a judge you are interpreting precedent or a statute or the Constitution, it is a tremendous responsibility, and it is one that gives you tremendous power over the lives of the individuals that come before your court.

It is also important—and I will stop with this bit of preaching—to keep the public trust and confidence. When people see judges making it up, or perhaps pursuing some agenda that is not readily

apparent in anything the legislature has written, or the Founding Fathers wrote, or any precedent written by the superior court, then they begin to wonder about the very legitimacy of the rule of law itself. So it is a very important work that you are undertaking, and I know each of you take that very seriously, and I trust you will discharge your responsibilities to the very best of your duty.

We will keep the record open for a week until Wednesday the 17th, in case there are any additional written questions that either Senator Leahy or I or any other member of the Committee would like to send to you, and we would of course like you to answer those.

I have also submitted a written statement from Chairman Hatch for the record, which will be made, without objection, a part of the record.

Senator LEAHY. I would, if I might submit also for the record, an editorial in the Burlington Free Press today, our State's largest newspaper, very supportive of Mr. Hall.

Senator CORNYN. Very good. With that, we will conclude this hearing, and thanks to all of you and good luck to you as well.

[Whereupon, at 3:23 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Jane J. Boyle
1100 Commerce Street, Third Floor
Dallas, Texas 75242

March 19, 2004

The Honorable Orrin G. Hatch
United States Senate
Chairman, Committee on the Judiciary
104 Hart Office Building
Washington, D.C. 20510

Dear Senator Hatch:

Enclosed please find my responses to the written questions from Senator Leahy. Thank you for your time and consideration in this matter.

Please let me know if you have further questions or need further information.

Sincerely,

JANE J. BOYLE

Enclosure

cc: The Honorable Patrick J. Leahy
United States Senate
Ranking Democratic Member
Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510

Responses of Jane Jackson Boyle To The Written Questions Submitted By Senator Patrick J. Leahy

1. Ms. Boyle, in your Senate Questionnaire I noticed that you assisted the Northern District of Texas in revamping the court's panel of private attorneys who represent indigent defendants in criminal trials. As you may be aware, Senator Hatch and I sponsored legislation as part of the Innocence Protection Act of 2003 to improve the quality of representation to indigents in capital cases. Please share with the Committee the changes you helped bring about to improve the panel of attorneys in the Northern District of Texas who represent indigent defendants, and why the changes were necessary.

When I began my tenure as a U.S. magistrate judge in Dallas in the early 1990s, the method for appointing attorneys to federal criminal cases involved selecting lawyers on a rotating basis from an alphabetized list of approximately 5000 Dallas-area attorneys. Inclusion on the list was mandatory for Dallas lawyers who were licensed to practice law in the state of Texas. Under this system, the quality of representation received by indigent criminal defendants was less than consistent because attorneys subject to appointment ranged from those who specialized in real estate and other transactional practices with little or no court room experience to seasoned litigators.

In 1993, after discussions with members of the criminal defense bar and after researching the issue with our United States District Court Clerk, I presented a proposal to the district judges of our court to upgrade our attorney appointment system. The proposal, aimed at increasing the quality of representation for indigent criminal defendants, involved reducing the size of the panel to a smaller, volunteer group of experienced litigators who would receive regular training on federal criminal law issues. The district judges embraced the plan and two district judges, our Clerk and I spent several months planning our new system and recruiting experienced litigators for the appointment list.

At the start of the planning process we called a meeting of a diverse group of attorneys to discuss the proposal and receive their input for improvement. Ultimately, the plan we devised and implemented was multi-part. First we determined that the size of the panel had to be significantly reduced to a group of approximately 300 lawyers. Next, we formulated an application and screening process to ensure that only experienced and willing criminal and civil litigators were included on the panel. To ensure ethnic diversity on the list of appointees, we attended meetings of numerous minority bar association groups to recruit qualified panelists. We then named a group of experienced federal criminal defense attorneys to serve as a liaison between the panel and the court. Finally,

with the help of the Federal Public Defender for the Northern District of Texas, we arranged free annual training for the panelists on a variety of federal criminal legal issues. The plan was implemented in January 1994 and has continued to operate successfully to this day.

2. Prior to becoming a United States Attorney, you spent twelve years as a United States Magistrate Judge for the Northern District of Texas from 1990-2002. In this capacity, you presided over a variety of matters including pre-trial criminal matters and civil trials. Given your extensive tenure as a magistrate judge, what is the single most important lesson you will draw from your experience as a magistrate, and how will your time as a magistrate benefit you as a district court judge should you be confirmed?

As a magistrate judge, the single most important lesson I learned was that judges are first and foremost public servants. By that I mean that judges have an unwavering obligation to the public to serve with fairness and integrity, to come to court prepared to really listen to the litigants and to avoid at all costs prejudging a matter or making less than informed decisions. The litigants deserve to have a prompt decision made by a judge who makes it his or her responsibility to thoroughly research and understand the law that applies to the facts of the case. If confirmed, I would take these principles I relied upon as a magistrate judge to the district court.

TROUTMAN SANDERS LLP
ATTORNEYS AT LAW
A LIMITED LIABILITY PARTNERSHIP

150 WEST MAIN STREET
SUITE 1600
P.O. BOX 3670
NORFOLK, VIRGINIA 23514-3670
www.troutmansanders.com
TELEPHONE: 757-640-0004
FACSIMILE: 757-640-1577

Walter D. Kelley, Jr.
walt.kelley@troutmansanders.com

Direct Dial: 757-687-7791

March 25, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: **Walter D. Kelley, Jr.**
United States District Court for the Eastern District of Virginia

Dear Senator Hatch:

By this letter, I am transmitting for the Judiciary Committee's consideration my answers to the written follow-up questions posed by Senator Patrick J. Leahy. Please let me know if you need any additional information.

Very truly yours,

Walter D. Kelley, Jr.

WDKJr.:jyp
Enclosure
cc: The Honorable Patrick J. Leahy
705634

**RESPONSES OF WALTER D. KELLEY, JR.
TO WRITTEN FOLLOW-UP QUESTIONS
OF SENATOR PATRICK J. LEAHY**

Question 1

Mr. Kelley, when you were elected Rector of Old Dominion University Board of Visitors, you were asked about the political nature of the position and politics in general. You responded that:

"[i]f you really believe strongly in how it is you think government should act with the citizenry . . . you can't sit on the sidelines and not be in the game. You're either in there trying to make happen that which you believe in, or you're ceding the whole debate to the other side."

In light of this statement please explain how you will transition from a life of politics and advocacy to a position on the bench where you need to assure litigants that you can and will be impartial?

Response

How one participates in the public affairs of this country depends on the role you are fulfilling. As a citizen, you influence policy and legislation principally by advocating the election of candidates who share your core beliefs. To be an effective legislator, you have to address a broader array of concerns than partisan advantage. To be an effective judge, you must command the respect of the citizenry and the Bar. This respect flows from being a patient, impartial, and dispassionate observer of the facts as well as a believer of the primacy of the rule of law.

For me, the first step in making the transition from a life of politics and advocacy is understanding that I will be in a different role with different rules. Rather than advocating the merits of particular policies and legislation, I will be in the role of implementing Congress' decisions on these matters. Our system of government, in which I believe deeply, is founded on the principle that the will of the people is expressed through the acts of their legislative representatives, not the judiciary.

Question 2

In reviewing your record, it appears that your litigation experience has been limited solely to civil matters, with the focus being on complex business litigation. Your role as Commissioner in Chancery for the Norfolk Circuit Court similarly did not afford you any experience beyond civil matters. As you are aware, federal district courts hear a variety of cases, including many involving complex criminal matters. Given that your trial experience is limited to civil litigation, what steps will you take to adequately prepare yourself to preside over the many stages of criminal proceedings?

Response

While it has been some time since I handled a criminal matter, I am familiar with the Federal Rules of Criminal Procedure and the stages of criminal proceedings by virtue of past experience. Between 1988 and 1995 I handled several white collar criminal cases from beginning to end, including grand jury investigations and negotiating plea agreements with the United States Attorney's Office. I stopped practicing in the area because my commercial and intellectual property litigation case load grew to the point that it left time for nothing else.

Since being nominated, I have met with numerous lawyers who practice criminal law to familiarize myself with recent developments in criminal prosecutions. At their recommendation, I have begun reading the Fourth Circuit Criminal Handbook (2003 edition). The sitting judges of the Eastern District of Virginia have substantial criminal law expertise and have volunteered tutorials on key points of criminal law and procedure. If confirmed, I would avail myself of their kind offer.

• • • The Burlington Free Press ■ **Wednesday,** March 10, 2004

A bipartisan judge

Vermont's two senators will say nice things today about U.S. Attorney Peter Hall's qualifications to be a judge on the U.S. Court of Appeals for the 2nd Circuit, one of the most prestigious federal benches.

The event is noteworthy because in a period of intense political partisanship, Hall is a Republican but his two Senate sponsors are not.

In recent years, nominations to the federal bench have frequently brought out the ideological hounds, who see the courts as a prime battleground in the nation's political and culture wars. The Senate Judiciary Committee has repeatedly been the scene of vicious confirmation hearings as both parties tried to influence the future direction of the federal courts.

That won't happen with Hall, who is perceived as a judicial moderate. His example is a reminder that Vermonters still have the ability to put partisan differences aside and recommend outstanding individuals for the judiciary.

President Bush nominated Hall to the federal appeals court last year with the backing of Gov. Jim Douglas and Sens. Patrick Leahy and James Jeffords.

At the time, some people speculated that a Vermonter might not be picked to replace Judge Fred Parker, who died last summer, even though the vacant appeals court seat traditionally went to a jurist from the Green Mountain State. The thinking was that Bush might choose someone from another state as a political slap against Leahy and Jeffords.

Leahy has drawn Republican ire as the Democratic leader of the Senate Judiciary Committee, where he has often tried to block GOP court nominees. Jeffords rankled the White House with his 2001 defection from the Republican Party.

Fortunately, the president tapped Hall, leading to his appearance today before the Senate Judiciary Committee as part of his confirmation proceedings. Following a formal introduction by Leahy and Jeffords, Hall will deliver a statement and answer questions from committee members. No formal vote will be taken today, though Hall's nomination is almost certain to pass the full Senate in the near future.

Hall presents an impressive resume as a prospective federal appeals judge. He served in the U.S. Attorney's Office from 1978 to 1986 and has been Vermont's top federal prosecutor since 2001. Prior to the U.S. attorney's post, he was in private practice in Rutland.

During his tenure as U.S. attorney, he created an anti-terrorism task force in the wake of the Sept. 11 attacks and beefed up law enforcement efforts to combat heroin and other drug-related crimes in Vermont.

Overseeing appeals from lower courts in New York, Vermont and Connecticut, the 2nd Circuit handles some of the country's most significant cases. Thanks to cooperation among Douglas, Leahy and Jeffords, the Vermonter on the court will be a top-notch jurist.

JAMES H. DOUGLAS
Governor

State of Vermont
OFFICE OF THE GOVERNOR

March 10, 2004

The Honorable Orrin G. Hatch, Chairman
The Honorable Patrick J. Leahy, Ranking Democratic Member
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

I am writing to express my strongest support for U.S. Attorney Peter Hall for appointment to the U.S. Court of Appeals, 2nd Circuit.

Peter's record of service to the people of Vermont is exemplary. As U.S. Attorney, he has been a strong and effective leader in Vermont's anti-terrorism effort. Peter has been a principal organizer in promoting "Operation Safe Commerce," an international initiative aimed to track and monitor cargo shipments that could be susceptible to terrorist attacks.

In addition, Peter has been an active leader in promoting the President's "Project Safe Neighborhoods" initiative designed to make our streets safer by taking guns out of the hands of convicted felons.

I unequivocally support Peter for the judgeship. He is a dedicated public servant, a strong leader, and will be an asset to the 2nd Circuit.

Sincerely,

James H. Douglas
Governor

JHD/ntl

109 State Street • The Pavilion • Montpelier, VT 05609-0101 • www.vermont.gov
Telephone: 802.828.3333 • Fax: 802.828.3339 • TDD: 802.828.3345

News Release
JUDICIARY COMMITTEE
United States Senate • Senator Orrin Hatch, Chairman

March 10, 2004 Contact: Margarita Tapia, 202/224-5225

Statement of Chairman Senator Orrin G. Hatch
Before the United States Senate Committee on the Judiciary
on the Nominations of

PETER W. HALL TO BE
U.S. CIRCUIT JUDGE FOR THE SECOND CIRCUIT;

JANE J. BOYLE TO BE
U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF TEXAS;

MARCIA G. COOKE TO BE
U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF FLORIDA;

WALTER D. KELLEY, JR. TO BE
U.S. DISTRICT JUDGE FOR THE EASTERN DISTRICT OF VIRGINIA

I am pleased to welcome four outstanding nominees to the Committee this afternoon, one for the federal appeals court bench and three for the district court bench.

Our nominee for the Second Circuit, Peter W. Hall has an outstanding academic record and a superb resume. He received his J.D. degree *cum laude* from Cornell Law School in 1977. Prior to that, he received a bachelor's degree in English and master's degree in Student Personnel Administration in Higher Education from the University of North Carolina at Chapel Hill.

Having considerable experience practicing law in both the private and public sector, Mr. Hall was unanimously confirmed by the United States Senate as the United States Attorney for the District of Vermont in September 2001. As the U.S. Attorney, he leads the office in representing the interests of the United States in court and helping to coordinate cooperative law enforcement efforts in the district, across neighboring and with Canadian law enforcement colleagues.

Mr. Hall has also been active in efforts to improve the quality of practice in his state and he is active in his local community. He served as President of the Vermont Bar Association from 1995-96, on the Federal District Court Advisory Committee for the U.S. District Court in Vermont as a Citizen Board Member of the Vermont Criminal Justice Training Council, and on the Board of the Vermont Karelia Rule of Law Project. From 1989-1994, he was a nonpartisan

elected Member of Select Board for the town of Chittenden, Vermont, and in 1995, he was the elected Justice of the Peace for Chittenden. He has also been involved in the lay leadership of his church.

Mr. Hall is an outstanding candidate who has been nominated to fill a vacancy that has been designated by the National Judicial Conference as a Judicial Emergency. He has overwhelming bipartisan support, including both of his home state senators, Senators Patrick Leahy and Jim Jeffords. I hope that my colleagues support my efforts to secure the speedy confirmation of this fine individual.

Jane J. Boyle, nominated to be United States District Judge for the Northern District of Texas, is an extremely experienced attorney who has tried over 180 cases to a verdict during her impressive career as an Assistant District Attorney, an Assistant United States Attorney, and as the United State Attorney for the Northern District of Texas. She has also served with distinction as a magistrate judge in the same district. Ms. Boyle brings a wealth of experience to the federal bench and she will make an excellent addition to the Northern District of Texas.

I am not alone in believing that Ms. Boyle will make an outstanding federal district judge. The Texas Employment Lawyers Association ("TELA") calls Ms. Boyle "considerate, concerned, and well-read," in addition to possessing "a great deal of knowledge about employment law" and an excellent judicial demeanor that is reflected in her "even-handed and fair" approach to adjudication. Ms. Boyle also has strong bipartisan support. The current Chair of the Dallas County Democratic Party has written a letter expressing her "enthusiastic support of the nomination of Jane J. Boyle," and a former Chair of the same organization wrote a letter stating that "in the case of this nominee, partisan considerations are unwise and should evaporate." I am always pleased to see nominees of Ms. Boyle's caliber before this Committee, and I will submit these letters for the record.

Marcia G. Cooke, nominated to be United States District Judge for the Southern District of Florida, is a distinguished attorney who has practiced with distinction in both Michigan and Florida. After graduating from Wayne State University Law School in December of 1977, she joined the Neighborhood Legal Services as a Staff Attorney. In 1979, she became the Deputy Public Defender in the Legal Aid and Defender Association. From 1980-1983 Ms. Cooke served as the Assistant United States Attorney for the Eastern District of Michigan. After one year at Miro, Miro & Weiner, Ms. Cooke was nominated to the federal bench as a magistrate judge where she served until 1992. At that time she joined the United States Attorney's Office for the Southern District of Florida where she remained until 1999. Ms. Cooke then spent three years as the Chief Inspector General in the Executive Office of the Governor before she accepted her current position as an Assistant County Attorney for Miami-Dade County. Ms. Cooke's 25 years of experience in the public sector will serve her well on the federal bench.

I will submit for the record a letter from the Wilkie D. Ferguson, Jr. Bar Association, formerly known as the Black Lawyers Association of Miami-Dade County. I will not read the letter in its entirety, but I have to agree with that association's assessment of Ms. Cooke. They state in part that, "[a] vote in favor of Attorney Cooke will be a vote in favor of honesty,

integrity, community, fairness and justice." I could not agree more, and I look forward to a speedy confirmation of this fine nominee.

Walter D. Kelley, Jr., nominated to be United States District Judge for the Eastern District of Virginia, possesses, in the words of those who have practiced with him "a keen legal mind, an even temperament, [a] great work ethic and a superb sense of values." He graduated *magna cum laude* from Washington and Lee University in 1977 and continued his legal education at the same institution. Mr. Kelley distinguished himself in his legal studies by, among other things, becoming the Lead Articles Editor for the *Washington & Lee Law Review*, and a member of the Order of Coif. After graduating, Mr. Kelley served as a law clerk to the Honorable Ellsworth Van Graafeiland of the United States Court of Appeals for the Second Circuit. He then joined the law firm of Wilcox and Savage, P.C. in 1982 where he remained until 2001. At that time, Mr. Kelley joined Troutman Sanders LLP where he currently practices in the area of business litigation with an emphasis on intellectual property and antitrust law.

Outside of his daily practice, Mr. Kelley serves as a master of the James Kent Inn of Court and Commissioner in Chancery for the Circuit Court of the City of Norfolk in addition to assuming a leadership role within his local bar organization. Since 1997 he has been listed in the "Best Lawyers in America" for business litigation, voted one of "The Legal Elite," for civil litigation in *Virginia Business* magazine's 2000, 2001, and 2002 annual surveys, and he has served an adjunct law professor of antitrust law at Regent University. He will make a superb federal district court judge, and I hope that my colleagues will join me in supporting his nomination.

I would note that all four of the nominees before us today have received unanimous Well Qualified ratings—the highest possible recommendation—from the American Bar Association. They are all superb individuals with outstanding records and experience. I look forward to reviewing the testimony from today's hearing and moving forward on these nominees. I thank them for appearing before the committee today.

###

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PETER A. KRAUS**
CHARLES S. SIEGEL

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°Charles E. Valles
Greg W. Lisemby
Jamie Reibenspies
‡‡Erika Brauch
Charles W. Branham, III
Susan Hays
▼Snar Swartzon
Clay B. Carroll

shays@awpk.com

3219 McKinney Avenue
Dallas, Texas 75204
Telephone 214-357-6244
Telecopier 214-357-7252

200 Oceangate, Suite 520
Long Beach, California 90802
Telephone 562-436-8833
Telecopier 562-590-7296

10015 Old Columbia Road
Suite B-215
Columbia, Maryland 21046
Telephone 410-312-5599
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DAVID C. GREENSTONE
‡MICHAEL L. ARMITAGE

OF COUNSEL: °James C. Barber

Benjamin R. Couture
***Scott M. Dolin
‡J. Clay M°Caslin

*Licensed in TX, CA, NC, & D.C.
**Licensed in TX & VA
‡Licensed in CA & LA
††Licensed in MD, PA, D.C. & TX
‡‡Licensed in CA only
‡Licensed in TX & TN
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***Licensed in TX, CA & NY
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°Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization; and Certified in Civil Trial Law by the National Board of Trial Advocacy.

March 8, 2004

Sen. Orrin G. Hatch, Chairman
Sen. Patrick J. Leahy, Ranking Democratic Member
All Other Members of the Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of Jane J. Boyle, for United States District Judge for the Northern District of Texas (Hearing: March 10, 2:30 p.m.)

Dear Chairman Hatch, Sen. Leahy, and other Members of the Committee,

I am writing in enthusiastic support of the nomination of Jane J. Boyle for United States District Judge, and urge you to recommend the confirmation of her nomination. I am the Chair of the Dallas County Democratic Party, and an appellate lawyer who has practiced with both a national corporate law firm, Akin Gump Strauss Hauer & Feld, LLP, and now with a plaintiffs' firm, Waters & Kraus, LLP. I am also the past-president of Texas Women Lawyers.

I met Judge Boyle when we both served on the Dallas Bar Association's Pro Bono Committee. Despite our political differences, I quickly recognized Judge Boyle as someone dedicated to public service and the rule of law. She is absolutely one of the most impressive figures I have met while practicing law in Dallas. Having worked on both sides of the bar, I can attest that both sides view Judge Boyle as a respected jurist who will follow the law, regardless of any political pressures. In short, she has precisely the quality of intellect and character that we need on the federal bench.

Joining me in urging you to confirm Judge Boyle's nomination is Marc Stanley, who currently on the executive committee of the Texas Trial Lawyers Association, and is the immediate past-president of the Dallas Trial Lawyers Association. Mr. Stanley is also very active in Democratic politics.

Given the strong consensus of support for Judge Boyle in the Northern District — from both sides of the bar and aisle — if any nominee is deserving of an election-year confirmation, it is Judge Boyle. Please contact me at the e-mail or number in the letterhead if you have any questions. Mr. Stanley may be reached at 214/443-4301 if you have any questions of him. I sign his name below with permission.

Sincerely,

Susan Hays

Marc Stanley

Statement of Senator James M. Jeffords
On the Senate Judiciary Committee Nomination Hearing of Peter W. Hall
To the U.S. Second Circuit Court of Appeals
March 10, 2004

I am pleased to be here today with the members of the Judiciary Committee to introduce and recommend Peter W. Hall for a seat on the United States Second Circuit Court of Appeals.

I am delighted to recommend Peter, but I am also a bit melancholy because his nomination is for the seat that was held by my close friend, the late Fred Parker. The loss of Judge Parker created a tremendous void in the legal community of Vermont and the Second Circuit. Judge Parker left some big shoes to fill, both literally and figuratively, but Peter is the ideal candidate to accomplish this task.

Peter and I both live in the Rutland area of Vermont. This has permitted me to know him and closely follow his career for over 20 years. This insight and knowledge allowed me to confidently nominate Peter in 2001 to serve as the U.S. Attorney in Vermont, and now enthusiastically support his nomination for a position on the Second Circuit Court of Appeals. I have the utmost faith in his ability to continue the line of excellent judges from Vermont on the Second Circuit Court of Appeals.

This nomination comes before the committee with the strong support of a large bipartisan group of Vermonters. Jim Douglas, the governor of Vermont, offered Peter's name to the president as the nominee for this seat, and both Senator Leahy and I support his nomination. In addition, my constituents believe Peter will be an outstanding judge on the Second Circuit Court of Appeals.

Peter will come to the Second Circuit with an extensive and wide knowledge of the law. Following law school, he clerked for the Honorable Albert W. Coffrin, a U.S. District Court Judge for Vermont. Peter has also worked for a prestigious law firm in Rutland, and held a variety of positions in the United States Attorney's office, most recently as the U.S. Attorney for Vermont, a position for which the Senate unanimously confirmed him in 2001.

In all of these positions Peter has excelled and done extraordinary work. I have heard nothing except praise from his colleagues, and firmly believe he will continue this record of excellence on the Second Circuit. Peter has also exhibited a proper temperament to be an exceptional jurist. I believe this comes naturally to Peter through his upbringing in Vermont, and I know that Peter will serve in the Vermont tradition of prudence and fairness.

I appreciate this opportunity to introduce Peter Hall to you for a seat on the Second Circuit Court of Appeals. I believe you will see in him what I have seen for many years, an individual who has strong values and exceptional judgment. I hope the Senate will swiftly confirm him to this seat, thus extending the line of excellent Vermont judges on the Second Circuit.

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U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement of Senator Patrick Leahy
Ranking Member, Senate Judiciary Committee
Judicial Nominations Hearing
March 10, 2004

I am pleased today to be able to introduce and recommend Peter Hall to the Committee. The President has nominated him to fill our vacancy on the United States Court of Appeals for the Second Circuit. He currently serves as our United States Attorney and has the strong support of Governor Douglas and the entire Vermont delegation. I thank Chairman Hatch for holding a hearing on this nomination, which I believe is one that has widespread support.

Before I say more about Peter Hall, I would like to take a moment to pay tribute to his predecessor, the late Fred Parker. Judge Parker was appointed to the United States District Court for Vermont in 1990 by the first President Bush on the strong recommendation of Senator Jeffords and with my support. He was then appointed to the Vermont seat on the Second Circuit by President Clinton on my recommendation and with the strong support of Senator Jeffords. He was a good man, a good lawyer and a good judge. From the time we met in law school at Georgetown, until his untimely death last year, Fred Parker was a man of integrity and intelligence. He served the courts and the people of Vermont with dedication and fairness, and he will be missed.

Peter Hall has big shoes to fill, but from what I know about him, he is up to the job. Peter had the nerve to be born in Connecticut and to go all the way to North Carolina for college and to attend law school in New York. Fortunately he came to his senses as soon as he graduated from law school and was privileged to clerk for the well-respected Judge Albert Coffrin of the United States District Court for the District of Vermont. He has been in Vermont ever since.

His career and the exemplary way he has served the United States Government and the law are to be admired. After completing his clerkship with Judge Coffrin, Peter joined the United States Attorney's office in Vermont, and was a federal prosecutor for the next 18 years, rising to the position of First Assistant and then later being named United States Attorney. During those years he has gained invaluable trial experience so beneficial for any judge, and learned about federal criminal law. But his resume is not limited to government service. In 1986 he began a 15-year career in the private practice of law, focusing on civil practice, with a particular emphasis on mediation. He also used his time during that period to serve the bar, providing ethics training to Vermont State prosecutors, and holding the office of the President of the Vermont Bar Association,

where he advocated for funding for public defenders and equal access to justice. He also found time for pro bono work, getting involved in the Vermont family court system and serving as guardian ad litem for children caught up in disputes between their parents.

In 2001, President Bush nominated Peter Hall to be the United States Attorney for Vermont. His record in that office is one of a tough but fair prosecutor. I supported Peter's nomination to that position and support him now.

Let there be no misunderstanding about Peter's party affiliation. Peter Hall is a Republican. From 1986 to 1993 he was variously a member of the Town of Chittenden, Rutland County, and State of Vermont Republican Party Committees, and he is a member of the National Republican Party. He has helped run statewide Republican campaigns, and was an elected Republican official for five years, holding one of the most important offices a citizen can hold in Vermont, as a Member of the Select Board of his town, the Town of Chittenden. He was recommended to the President by Vermont's Republican Governor. As Governor Douglas notes in his letter of support for this nomination, Peter is "a dedicated public servant, a strong leader and will be an asset to the Second Circuit." I ask that the letter be included in the record.

Equally clear, however, is his commitment to the law, to fair judging and to leaving any partisan label or interest at the courthouse door. Peter Hall is the type of nominee this President should send us more often. He is universally respected and is someone in the nature of a consensus selection. He has proven himself over long years of federal service and private practice to be the sort of straight-shooting, fair-minded person that any litigant in a federal courtroom can be confident will give him a fair hearing and a fair shake. I wish as much could be said about some of the more controversial nominees this President has sent us over the last four years.

As I hope I made clear, Peter's qualifications, experience and support across the political spectrum makes him the kind of consensus nominee who proves that when there is thoughtful consideration and collaboration, this process can work. I look forward to his testimony today.

#####

WILSON, WILLIAMS & MOLBERG
A Professional Corporation
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2214 MAIN STREET
DALLAS, TEXAS 75201-4359
(214) 748-5276
FAX (214) 748-7965
www.wwmlawfirm.com

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JOHN D. WILSON
OF COUNSEL

March 6, 2004

Via fax: (202) 224-9102

The Honorable Orrin Hatch
Chairman of the Judiciary Committee
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Re: U.S. District Court Nominee Jane Boyle (N.D. Tex.)

Dear Senator Hatch:

I write to support United States Attorney Jane Boyle's nomination to the United States District Court for the Northern District of Texas.

It is seldom that I have written in support of a judicial nominee - particularly one submitted by the opposition party. The last time that happened was when Judge David Godbey was nominated. It is more likely you have heard from me in opposition to various nominees. The nomination of Jane Boyle, however, merits different comment.

I am the senior member of the State Democratic Executive Committee, having first been elected to that body in 1982 and re-elected every two years thereafter. I was also elected in three primary elections in Dallas county between 1990 and 1995 as the Dallas County Democratic Chairman. My party credentials are unassailable.

Why, then, does someone with these credentials make this special effort to support Jane Boyle? It's very simple. In the case of this nominee, partisan considerations are unwise and should evaporate. I have been a lawyer on the civil side of the docket in this community for 28 years. Approximately one-half of my practice has been in the federal courts. It is no secret that from a professional perspective, I have several pointed criticisms of the federal judiciary. And it is likewise no secret that I have an intense interest in that judiciary - the caliber of the appointees, their legal knowledge and their temperament.

I appeared before Jane Boyle on many occasions during the 10 years she served as United States Magistrate Judge for the Northern District of Texas, which preceded her appointment by President Bush to the position of United States Attorney for the district. She did not always rule in my favor. Sometimes I won; other times I lost. Yet, on each occasion my clients and I were treated with the type of fairness and respect that should be a model for other jurists. Judge Boyle possesses an ability to be firm and fair in the adjudicatory process. Equally important, it was apparent on each occasion that she was familiar with the record in the case and had focused on the issues. She was always well-studied and prepared. Not once did the lawyers have to re-invent the wheel, so to speak. In other words, her intellect, preparedness and perception are top-notch.

I can assure you that my opinion is shared by the vast majority of those on all sides of the docket, Republicans and Democrats, who practice in the Northern District. This is not a small sample. As an officer of two statewide legal organizations, including that of president of the Texas Employment Lawyers Association, I come into contact with an immense number of practitioners on a daily basis. Of the many I have spoken to about Jane Boyle's nomination, not a single one has expressed opposition. To the contrary, there is obvious unanimity among my colleagues that this is a first-rate nomination.

I urge a speedy confirmation of this excellent nominee. Please feel free to share my thoughts with the esteemed members of the Committee. As indicated, I am forwarding a copy of this letter to Sen. Leahy, the Committee's ranking Democratic member, and to Sen. Kennedy, with whom and whose family I have been a political ally for many years.

Respectfully,

Kenneth H. Molberg

KHM/kda

cc: Honorable Patrick J. Leahy
Honorable Edward M. Kennedy

NELA
Advocates for Employee Rights
National Employment Lawyers Association

Founder
Paul H. Tobias

President
Frederick M. Gittes

Executive Director
Terisa E. Chaw

NELA SUPPORTS THE NOMINATION OF PETER HALL TO THE 2ND CIRCUIT COURT OF APPEALS

The National Employment Lawyers Association (NELA) supports the nomination of Peter Hall to the 2nd Circuit Court of Appeals. Mr. Hall is currently the U.S. Attorney for the State of Vermont, a position he has held since 2001. Mr. Hall has the support of both Senator Jeffords and Senator Leahy, who have expressed their belief that he will make a fair and impartial judge. After conducting extensive research into Mr. Hall's background and legal experience, NELA sees no reason why he should not be confirmed.

From 1978 to 1986 Mr. Hall served as an assistant United States Attorney in Vermont. From 1986 until 2001 he was in private practice at a respected Vermont law firm, and became Vermont's chief federal prosecutor in 2001. He has been President of the Vermont Bar Association, and is known to be a frequently chosen mediator in civil cases. Mr. Hall also set up "Project Safe Vermont," a cooperative effort among federal, state and private agencies aimed at reducing illegal handgun possession in Vermont, and focusing on the connection between domestic violence and gun crimes.

We are pleased to support this nomination, which we understand to have been the product of a bipartisan consultation process. Senator Leahy noted that "this nomination is a model for how judicial nominees should be selected. The consultation between the White House, Governor Douglas and the Vermont Senate delegation has resulted in a consensus nomination we all support."

National Office • 44 Montgomery Street, Suite 2080 • San Francisco, California • 94104 • TEL 415.296.7629 • FAX 415.677.9445
email: nelahq@nelahq.org • www.nela.org

Statement of Senator Bill Nelson
Senate Judiciary Committee
Nomination Hearing for Marcia Cooke
March 10, 2004

Members of the Judiciary Committee, it is with great pride and pleasure that I have the opportunity to introduce Marcia Cooke for appointment to the United States District Court for the Southern District of Florida.

Ms. Cooke is the eldest of the four children of Ella and Heyward Cooke of Detroit, Michigan. Ms. Cooke matriculated at Georgetown University and Wayne State University Law School. She has served with distinction in all of her legal positions. She is intimately familiar with all sides of our judicial system as she has at various times served as a prosecutor and a public defender, a plaintiffs' attorney and a defense attorney, she has been in private practice and government service, she has represented the poor and the wealthy, she has been an advocate and a judge spending eight years as a United States Magistrate Judge for the Eastern District of Michigan.

During her tenure in the United States Attorney's Office, she worked to ensure the safety, security and availability of federal inmates and witnesses so that the mission of our judicial system, and just as important, the rights of the accused, were not compromised. Her excellence, dedication and enthusiasm did not go unnoticed, and in 1999, she left Miami for Tallahassee where she was appointed by Governor Jeb Bush to serve as Chief Inspector General. As the Chief Inspector General she was responsible for promoting accountability, integrity, efficiency and ethical behavior in the agencies under the jurisdiction of the Executive Office of the Governor. Upon leaving Tallahassee, she returned to Miami to work in the Miami-Dade County Attorney's Office where she continued to work on behalf of the citizens of Florida.

Ms. Cooke's commitment to legal excellence, is evident not only in her work, but in her service as an instructor with the National Institute of Trial Advocacy and as an adjunct professor with Wayne State University and the University of Miami Law Schools. She is also a frequent

lecturer for trial practice and litigation programs throughout the country. Ms. Cooke is active in local and national bar associations as well as her university alumni associations. She served as national president of the Georgetown University Alumni Association, and was the recipient of the John Carol Medal in 2000.

We have an extraordinarily qualified candidate in Ms. Cooke, and Senator Graham and I give her our full-hearted endorsement.

c-03-2003 11:07am From-Butler & Harris 7135265677 T-476 P.001/001 F-02

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David Kern, *El Paso* * Sheila Owsley, *Houston*

December 3, 2003

Sent by fax to (202) 224-9102

The Honorable Orrin Hatch
Chairman of the Judiciary Committee
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I write on behalf of the Texas Employment Lawyers Association to support United States Attorney Jane Boyle's nomination to the United States District Court for the Northern District of Texas.

The Texas Employment Lawyers Association (TELA) is a voluntary bar association of Texas lawyers who regularly represent employees in labor and employment matters. A large part of our practice is in federal court and we are thus very concerned with the quality of the federal judiciary in Texas. A number of our members regularly practiced before Jane Boyle when she was a United States Magistrate Judge and found her to be considerate, concerned, and well-read.

We are very pleased that President Bush has nominated Jane Boyle. Her ten years of service as a U.S. Magistrate Judge showed both that she has a great deal of knowledge about employment law and that she is even-handed and fair in all her decisions. In her court, all parties get a fair shake. We cannot think of a better recommendation for any judge. We thus respectfully ask that you give Jane Boyle your full support.

Very truly yours,

Katherine L. Butler

Katherine L. Butler
Chair of the Judicial Oversight
Committee

c: U.S. Attorney Jane Boyle

PARR WADDOUPS BROWN
GEE & LOVELESS *A Professional Corporation*
Attorneys at Law

KENNETH B. TILLOU
e-mail: kbt@pwlaw.com

October 31, 2003

Hon. Orrin G. Hatch
United States Senate
104 Hart Office Building
Washington, D.C. 20510

Re: Nomination of Walter D. Kelley, Jr. to the United States District Court for the Eastern District of Virginia

Dear Senator Hatch:

I understand that President Bush recently nominated Walter D. Kelley, Jr. of Norfolk, Virginia, for a judgship on the United States District Court for the Eastern District of Virginia. I am writing in support of Walt Kelley's nomination and to urge you to use the considerable influence of your office to expedite his confirmation.

Prior to moving to Utah several years ago, I was privileged to have practiced law with Walt Kelley for nearly 15 years. Walt possesses a keen legal mind, an even temperament, great work ethic and a superb sense of values. While neither I nor my colleagues here in Salt Lake City are apt to appear before Judge Kelley in the future, the citizens of Utah and other regions of the country will benefit, if not directly, at least indirectly, from the wisdom that he will bring to the federal bench.

Your support of his speedy confirmation will be greatly appreciated.

Very truly yours,

Kenneth B. Tillou

KBT:mkk

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Telephone (801) 532-7840 • Facsimile (801) 532-7750 • Website: www.pwlaw.com

United States Senate

WASHINGTON, DC 20510

For Immediate Release
August 1, 2003

Contact: John Ullyot
202-224-6290

SENATORS WARNER AND ALLEN ANNOUNCE JUDICIAL RECOMMENDATIONS FOR VIRGINIA'S EASTERN DISTRICT

Today, Senators John Warner, R-Va., and George Allen, R-Va., announced that they have recommended the following three Virginians to the President as potential nominees for the vacancy on the United States District Court in the Eastern District of Virginia.

The names are listed below in alphabetical order:

- **James L. Chapman, IV of Norfolk**

Mr. Chapman is a partner with the Norfolk law firm of Crenshaw, Ware and Martin where he has developed an expertise in maritime and admiralty law. A graduate of the Washington and Lee University School of Law, Mr. Chapman spent four years on active duty in the United States Army as a J.A.G. officer. He has taught trial practice at Regent University School of Law since 2001. He has served as President of the Future of Hampton Roads, Inc. and Chairman of the Southeastern Admiralty Law Institute, as well as Proctor for the Maritime Law Association of the United States.

- **Walter DeKalb Kelley, Jr. of Norfolk**

Mr. Kelley is a partner with the Norfolk law firm of Troutman Sanders where he specializes in business litigation. A graduate of the Washington and Lee University School of Law, Mr. Kelley clerked for Judge Ellsworth Van Graafeiland of the United States Court of Appeals for the Second Circuit in New York, New York. He currently serves as a Commissioner in Chancery for the Circuit Court of the City of Norfolk and was also an Adjunct Professor at the Regent University School of Law teaching antitrust law. With over 20 years of experience in the private practice of law, Mr. Kelly has been listed since 1997 in The Best Lawyers in America for business litigation.

- **Patricia L. West of Virginia Beach**

Ms. West has served as a judge on the Circuit Court of the Second Judicial Circuit in Virginia Beach since March, 2000, after serving two years as a judge on the Juvenile and Domestic Relations Court. A graduate of the Marshall-Wythe School of Law of the College of William and Mary, Ms. West was appointed Secretary of Public Safety by Governor George Allen after serving as Director of the Department of Juvenile Justice.

She has served both as a Deputy Commonwealth's Attorney for the City of Norfolk and an Assistant Commonwealth's Attorney for the City of Virginia Beach.

A copy of the Senators' letter to the President is attached.

-- 30 --

United States Senate
WASHINGTON, DC 20510

July 30, 2003

The President
The White House
Washington, DC 20500

Dear Mr. President:

We are very pleased to recommend to you the names of three fine Virginians for your consideration to serve as United States District Judge for the U. S. District Court for the Eastern District of Virginia.

We view our recommendation of persons to serve as federal judges as one of the most important responsibilities we undertake.

After evaluating their files and interviewing applicants in a very strong field of candidates, we are very pleased to forward the names of the following three in alphabetical order:

James L. Chapman, IV of Norfolk

Walter DeKalb Kelley, Jr. of Norfolk

Patricia L. West of Virginia Beach

We look forward to working with you to provide whatever assurances you may need to ensure this appointment meets your highest standards.

Respectfully,

George Allen

John Warner

Enclosures

NORFOLK & PORTSMOUTH BAR ASSOCIATION

CONRAD M. SHUMADINE, *PRESIDENT*
WILCOX & SAVAGE, P.C.
1800 BANK OF AMERICA CENTER
ONE COMMERCIAL PLACE
NORFOLK, VIRGINIA 23510

MARTHA P. MCGANN, *PRESIDENT-ELECT*
DEPUTY CITY ATTORNEY
908 CITY HALL
810 UNION STREET
NORFOLK, VIRGINIA 23510

June 6, 2003

STANLEY G. BARR, JR., SECRETARY
KAUFMAN & CANOLES, P.C.
150 WEST MAIN STREET, SUITE 2100
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CHARLES E. MALONE, *TREASURER*
1218 SUNTRUST CENTER
500 EAST MAIN STREET
NORFOLK, VIRGINIA 23510

The Honorable John William Warner
United States Senator
225 Russell Senate Office Building
Washington, D.C. 20510

The Honorable George Allen
United States Senator
204 Russell Senate Office Building
Washington, D.C. 20510

Re: Vacancy in the United States District Court
for the Eastern District of Virginia

Dear Senators Warner and Allen:

The Norfolk and Portsmouth Bar Association has considered the four candidates who have requested endorsement for the judicial vacancy created by Judge Henry Coke Morgan, Jr.'s election to take senior status. The Association's endorsement process involves an evaluation by a Judicial Endorsement Committee consisting of public representatives, a retired judge, and members of the Association. In addition, the Association submits those found qualified for an endorsement by all members.

We are pleased to report that the following candidate has been found to be highly qualified by the Committee and by the voting members of the Association:

Walter D. Kelley, Jr.

The following candidates listed in alphabetical order have been found qualified by the Committee and highly qualified by the membership:

Glen A. Huff
Ray W. King

The following candidate has been found qualified by the Committee and the membership:

James L. Chapman, IV

The Norfolk and Portsmouth Bar Association is the largest voluntary bar association in Hampton Roads and has over 900 members. The majority of the membership regularly practice in the United States District Court for the Eastern District of Virginia. On behalf of our membership, we thank you for considering the above endorsements for this Federal Judgeship.

Very truly yours,

Conrad M. Shumadine
President

CMS/mih

V·B·A
The Virginia Bar Association

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Chartered 1890

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Charles B. Arrington, Jr.

President
Frank A. Thomas, III
P.O. Box 871
Orange, VA 22960
(540) 672-2711

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555 13th Street, NW
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(202) 637-5600

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May 29, 2003

The Honorable John Warner
United States Senate
225 Russell Senate Office Building
Washington, D.C. 20510

The Honorable George Allen
United States Senate
204 Russell Senate Office Building
Washington, D.C. 20510

Re: Prospective Vacancy on the United States District Court
For the Eastern District of Virginia

Dear Senators Warner and Allen:

In keeping with the letter request from your offices on May 6, 2003, and based upon the review of candidates by The Virginia Bar Association Blue Ribbon Committee on Federal Judgeships for the Eastern District of Virginia, we can now state that we would support the candidacies of the following three individuals, listed in alphabetical order:

James L. Chapman, IV, Esquire of Norfolk
Glen A. Huff, Esquire of Virginia Beach
The Honorable Robert J. Humphreys of the Court of Appeals of Virginia.

This is to further state that we would particularly support the candidacies of the following two individuals, also listed alphabetically:

Walter D. Kelley, Jr., Esquire of Norfolk
The Honorable F. Bradford Stillman, United States Magistrate Judge

If there is something further that we can provide, we would be pleased to do so.

Respectfully submitted,

Frank A. Thomas, III
President

CC: John M. Ryan, Esq.
C. B. Arrington, Jr., Esq.

EXHIBIT
Tabbies
1

VIRGINIA ASSOCIATION OF DEFENSE ATTORNEYS

707 East Main Street
Suite 1605
Richmond, Virginia 23219

(804) 649-1002 phone
(804) 649-1004 fax

vada@infi.net
www.vada.org

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June 3, 2003

The Honorable John William Warner
United States Senator
225 Russell Senate Office Building
Washington, D. C. 20510

The Honorable George Allen
United States Senator
204 Russell Senate Office Building
Washington, D. C. 20510

Re: United States District Court for the
Eastern District of Virginia Vacancy

Dear Senators Warner and Allen:

The Virginia Association of Defense Attorneys ("VADA") has considered the candidates for the judicial vacancy created by the taking of senior status by the Honorable United States District Judge Henry C. Morgan, Jr. of the Eastern District of Virginia. We are pleased to advise you that we have endorsed several persons as being highly qualified and outstanding candidates for this judicial vacancy. Among the endorsed candidates, we express no rating or preference. The candidates endorsed by the VADA are listed below in alphabetical order.

For the vacancy on the U. S. District Court for the Eastern District of Virginia, the VADA endorses:

Glen A. Huff, Esquire
Walter D. Kelley, Jr., Esquire
The Hon. F. Bradford Stillman, United States Magistrate Judge

As the state-wide voluntary bar association comprised of over 800 attorneys whose practice is primarily focused on the defense of civil litigation, the VADA is pleased to have been given the opportunity to consider candidates for this important judicial vacancy. Thank you again for requesting that the VADA make endorsements on the candidates for this federal judgeship.

Very truly yours,

Robert B. Delano, Jr., President

Richard J. Dalton, President
Dalton, Greiberg and Mook, P.C.
508 King Street, Suite 200
Alexandria, Virginia 22314-3016
Telephone: (703) 684-4333

Jeannie P. Dahnk, President-elect
P.O. Box 2107
Fredericksburg, Virginia 22404-2107
Telephone: (540) 372-6600

Thomas A. Edmonds
Executive Director and
Chief Operating Officer

Virginia State Bar

Eighth and Main Building
707 East Main Street, Suite 1500
Richmond, Virginia 23219-2800
Telephone: (804) 775-0500

Facsimile: (804) 775-0501 TDD: (804) 775-0502

Barbara Ann Williams
Bar Counsel

Mary Yancey Spencer
Deputy Executive Director

Elizabeth L. Keller
Assistant Executive Director
for Bar Services

Susan C. Busch
Assistant Executive Director
for Administration

June 4, 2003

The Honorable John Warner
United States Senate
Room 225, Russell Building
Washington, DC 20510

The Honorable George F. Allen
United States Senate
Room 204, Russell Building
Washington, DC 20510

Dear Senators Warner and Allen:

The Virginia State Bar appreciates the opportunity for its Judicial Nominations Committee to review the qualifications of persons interested in the vacancy on the federal bench in the Eastern District of Virginia occasioned by the retirement of Judge Morgan, and to recommend the best qualified candidates to you for your consideration in making your recommendations to the President.

Following notice of the vacancy in the *Virginia Lawyers Weekly* and the collection of extensive background information on each known candidate, the Judicial Nominations Committee conducted interviews with nine individuals on Monday, June 2, 2003. The committee's report and recommendations were reviewed today by the Executive Committee and approved. The Virginia State Bar recommends the following four candidates as best qualified at this time from among the candidates considered. Under our procedure, these names are submitted in alphabetical order:

The Honorable Robert J. Humphreys
Walter D. Kelley, Esq.
Ray W. King, Esq.
The Honorable F. Bradford Stillman

Again, the Virginia State Bar is pleased to have the opportunity to participate in the judicial appointment process. We are confident that any one of the individuals the state bar has endorsed would make an excellent choice.

Sincerely yours,

Bernard J. DiMuro

BJD/vb

c: James L. Chapman, Esq.
Fernando Groene, Esq.
Craig A. Huff, Esq.
The Hon. Robert J. Humphreys
Walter D. Kelley, Esq.
Ray W. King, Esq.
Lawrence R. Leonard, Esq.
Jennifer T. Stanton, Esq.
The Hon. F. Bradford Stillman
Executive Committee
Judicial Nominations Committee
Senior Staff

Virginia Women Attorneys Association
Post Office Box 513
Richmond, Virginia 23218-0513
1-888-282-VWAA

June 11, 2003

The Honorable John Warner
United States Senate
225 Russell Senate Office Building
Washington, DC 20510

The Honorable George Allen
United States Senate
204 Russell Senate Office Building
Washington, DC 20510

Re: Judicial Screening Committee Results
United States District Court, Eastern District of Virginia Vacancy - Norfolk Division

Dear Senators Warner and Allen:

I am writing in regard to the vacancy on the United States District Court for the Eastern District of Virginia, Norfolk Division.

The Virginia Women Attorneys Association ("VWAA"), through its Judicial Screening Committee ("Committee"), solicited the involvement in our process of all candidates for the vacancy.

Serving on the Committee were the following members who were selected based on their active federal court practice and geographic diversity:

Marni E. Byrum, Esq. (Chair)
2009 N. 14th Street, Suite 610
Arlington, VA 22201
(703/525-3877)

Beverly A. Burton, Esq.
Richmond City Attorney's Office
900 E. Broad Street, Suite 300
Richmond, VA 23219
(804/646-7953)

Carolyn Carpenter, Esq.
2119 E. Franklin Street, Suite 100
Richmond, VA 23233
(804/643-1003)

Darrel Tillar Mason, Esq.
4600 Cox Road, Suite 205
Glen Allen, VA 23060
(804/967-2553)

Sandra M. Rohrstaff, Esq.
Miller & Associates
809 Cameron Street
Alexandria, VA 22314

On Monday June 2, 2003, the committee interviewed seven candidates. Based upon a thorough review of the documentation submitted by each candidate and their personal interviews the committee makes the following recommendations.

1. By at least a majority vote, four candidates were found to be **qualified** for the position, and to meet the minimum requirements for fairness, experience, intellect, temperament, professionalism and integrity.

   James L. Chapman
   Fernando Groene-Martinez
   Walter D. Kelley
   Ray W. King

2. By at least a majority vote, one candidate was found to be **recommended** for the position.

   Glen A. Huff exceeded the minimum requirements for the position. The committee was impressed by his background, demeanor and candor, as well as his experience as a commercial arbitrator and other quasi judicial positions.

3. By at least a two- thirds majority vote, two candidates were found to be **highly recommended** for the position.

Lawrence R. Leonard is an Assistant United States Attorney who has a broad background of civil and criminal practice. He has represented both plaintiffs and defendants in complex civil litigation. Mr. Leonard is well respected by his peers and his opposing counsel. The brief which he submitted demonstrated a clear and well reasoned style of communication.

Hon. F. Bradford Stillman is a Magistrate Judge in the United States District Court for the Eastern District of Virginia. Prior to taking the bench he had a diverse litigation practice representing plaintiffs and defendants, individuals, businesses and municipalities. The committee was impressed with Judge Stillman's candor about the judicial learning curve and the efforts he makes to be "educated" about the issues he must decide. The writing samples he submitted demonstrated thorough and well reasoned opinions.

I hope that this information is of value to you during your deliberations. If we can answer any questions or be of assistance to you, please feel free to contact Marni Byrum, Chair of this Judicial Screening Committee at (703) 525-3877 or me at (540) 853-2431. Your consideration of our endorsements for this judicial vacancy is greatly appreciated.

Very truly yours,

Elizabeth K. Dillon

Elizabeth K. Dillon
President, Virginia Women Attorneys Association

c: Candidates
Marni E. Byrum, Esquire

WDFBA

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Kenneth E. Walton, II
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Walter Harvey
President-Elect

Schnae N. Mitchell
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Muslima Lewis
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Veronica Harrell-James
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Richard O. Dansoh
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Reginald J. Clyne
Cynthia A. Everett
Jason M. Murray
Marc A. Douthit
The Honorable
Shirlyon McWhorter

The
WILKIE D. FERGUSON, JR.
BAR ASSOCIATION

—CONTINUING THE LEGACY—

Tuesday, March 09, 2004

The Honorable Orrin G. Hatch
United States Senate
104 Hart Office Building
Washington, D.C. 20510

Dear Senator Hatch:

On Wednesday, March 10, 2004, Attorney Marcia Cooke will be considered by you and other honorable members of the United States Senate to replace a judicial vacancy left by the passing of the Honorable Wilkie D. Ferguson, Jr.. Our organization was formerly known as the Black Lawyers Association of Miami-Dade County, but was renamed with the permission of Betty T. Ferguson, Judge Ferguson's surviving spouse and a long-time Commissioner here in Miami-Dade County. Hence, this appointment is of high importance to our organization and the entire South Florida Community.

Please be advised that it the unwavering opinion of this Association that Attorney Cooke possesses the highest level of moral character and professionalism. Additionally, she has been an outstanding and selfless contributor to our community, just as Judge Ferguson himself was. As such, she has the full support of the Wilkie D. Ferguson, Jr. Bar Association. Her appointment to federal bench would serve to continue the great legacy of Judge Ferguson and would be a tremendous benefit to citizens who would appear before her court.

A vote in favor of Attorney Cooke will be a vote in favor of honesty, integrity, community, fairness and justice. All of which were characteristics of Judge Ferguson, and the many other great judges that have been passed the muster of the United States Senate.

Thank you allowing me the opportunity to speak on behalf of those of us that have worked with Attorney Cooke and have benefited from her service. Additionally, thank you for all the hard work and the service that you and the other Senators provide for our great country.

Sincerely,

Kenneth E. Walton, II
President

Founded in 1977